Office - Supreme Court, U. S.
FILED
AUG 20 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1953

346 U.S.
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Docket No. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION,

Petitioners,

v.

SECURITIES & EXCHANGE COMMISSION, CITIES SERVICE COMPANY, ARKANSAS NATURAL GAS CORPORATION, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY, CLASS A COMMON STOCK COMMITTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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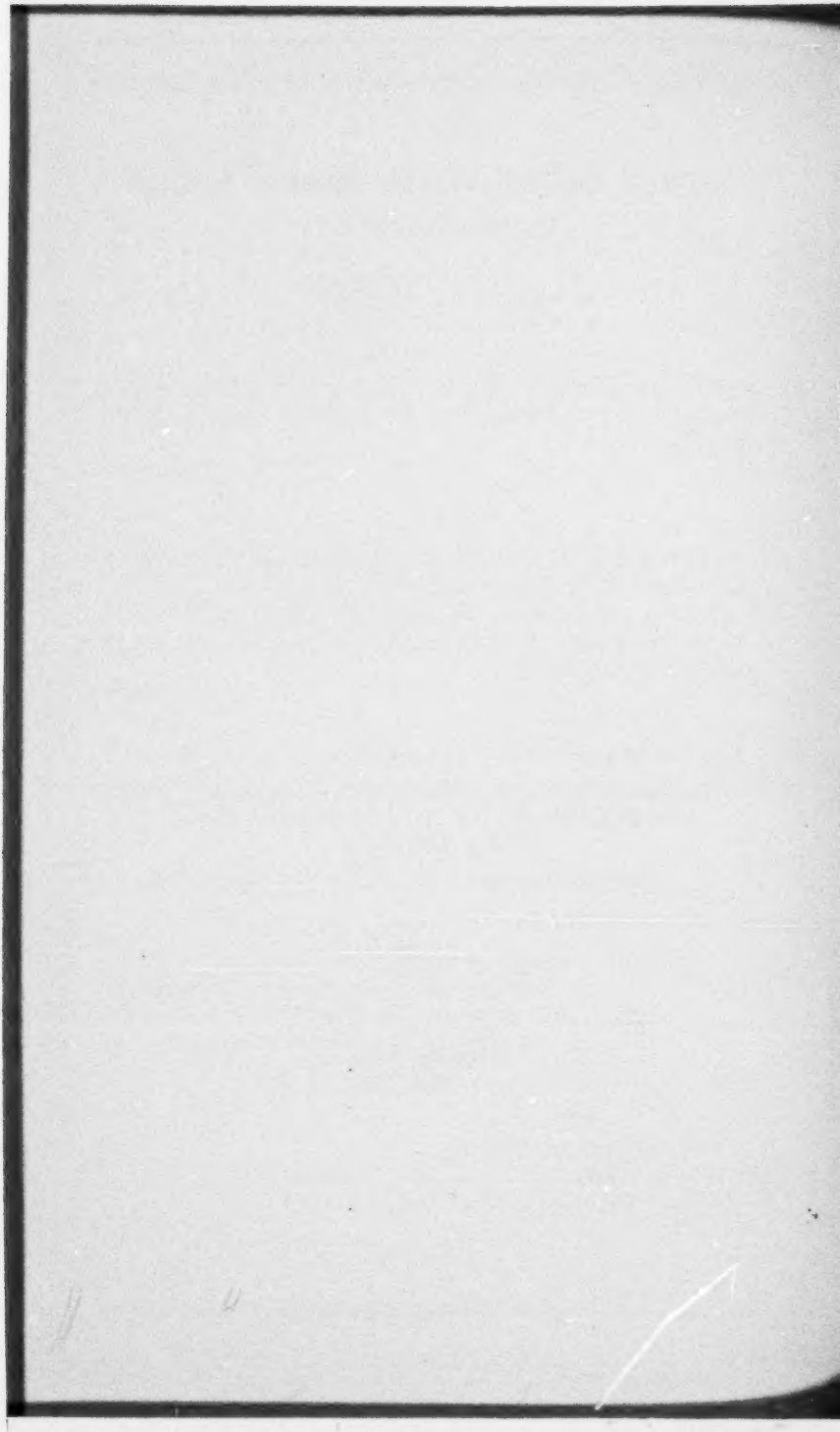

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of

ARKANSAS NATURAL GAS CORPORATION, CITIES SERVICE COMPANY, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY.

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petition of the Public Common Stockholders' Protective Committee respectfully shows:

I

Summary Statement of the Matter Involved

The Securities and Exchange Commission, pursuant to Sections 11(e) and 18(f) of the Public Utility Holding

Company Act of 1935, filed an application in the United States District Court for the District of Delaware for an order approving and enforcing an amended plan of reorganization and simplification of Arkansas Natural Gas Corporation ("Arknat"), a registered holding company and subsidiary of Cities Service Company ("Cities"), which amended plan was approved by findings and opinion and order of the Commission dated October 1, 1952.

By order dated January 29, 1953 said plan was approved by Hon. Albert B. Maris, United States Circuit Judge sitting as a District Court. From that order petitioners appealed to the Court of Appeals for the Third Circuit which on May 28, 1953, affirmed the order of the District Court

The sole question presented (and purposely so, in order to avoid any possible confusion with other details of the plan) was whether the two classes, Public Common stockholders and Public Class A stockholders of Arknat, whose contractual rights were absolutely identical (except that the Public Common stockholders had the right to vote) could receive disparate and discriminatory treatment without any legal justification or basis.

In the course of the proceedings before the Commission numerous claims were asserted by both stockholders' committees against Cities because of its position as controlling and dominant stockholder in Arknat. The amended plan provided that Cities would pay 25¢ per share to the Public Common stockholders of Arknat and $1.50 per share to the Public Class A stockholders of Arknat in full settlement of all claims against Cities in a derivative capacity or otherwise. The record establishes that, before the Commission, Cities resisted this discrimination between the two classes of stockholders and asserted that both classes should be afforded identical rights in accordance with the charter provisions. Thereafter, before the District Court, Cities accepted the Commission's decision and joined with it in

asking enforcement of the Plan, claiming then with the Commission that the payment of $1.25 per share additional to the Class A stockholders was a "private settlement" of their alleged class claim based on market manipulation by Cities in 1929 in connection with the public sale of that stock.

Petitioners' contention then and now is that there is no valid legal basis for any such claim on the part of the present transferee holders of the Class A stock, constituting over 94 % of the total, and that in the absence of such valid legal basis, the additional payment to the Class A stockholders is discriminatory and illegal. This position has never been successfully refuted by any of the parties in this proceeding or in the opinions of the courts below.

Without some valid legal basis, the alleged settlement becomes merely a technique for differentiation and discrimination between stockholders of equal rights. The District Court and the Circuit Court, by accepting the alleged "settlement" at face value and refusing to examine the alleged basis, make the injury irreparable and not even subject to review.

To the repeated challenge of the Public Common Stockholders Committee to have any of the parties submit a single authority which would sustain the right of the Commission to discriminate between the two equal classes of stockholders the sole defense offered by way of avoidance rather than by refutation was adopted by the Circuit Court and stated in its opinion as follows (68a):

> "We think there is no merit in the position taken by the appellants here. They are not hurt by anything which has been done. We fail to see how they have any more standing to complain than would any stranger on the street who read about the litigation and disapproved the result."

On a similar basis the victim of an assault who disapproved the newspaper report of the incident might be held to be without legal recourse.

Misconceiving petitioners' position, the Court of Appeals has ruled that because they did not question the adequacy of the settlement of the derivative claims (as to which there were genuine questions of fact making the Commission's determination and settlement, under the cases, not subject to further review by the District Court) petitioners had no interest in the purported settlement made with the Class A stockholders for their so-called class claim. The Court of Appeals failed to look behind the first roadblock and gave complete faith and credit to a label (conjured up after the fact) that a "private settlement" was made with Class A stockholders which in no way diluted the interest of the Common stockholders.

The record abundantly establishes that

(1) the Commission, not Cities, made the disparate allocation between the two classes of stockholders,

(2) Cities from the beginning resisted any such allocation, clearly refuting any concept of a private offer of settlement to the Class A stockholders,

(3) the alleged class claim is based upon market manipulation by Cities in the sale of the Class A stock in 1929, although it obviously and of necessity had to similarly manipulate the market in the oustanding Common stock, and although 94.11% of the present Class A stockholders purchased their shares after the manipulation period, and

(4) claims exceeding $50,000,000 were asserted against Cities which as a matter of law could only be derivative.

The law is clear that (1) fraud and misrepresentation practiced at varying times upon different stockholders give rise to individual causes of action and not class claims (except a "spurious" class claim, which is merely a procedural device to avoid multiplicity of suits where common questions of fact or law exist) and (2) transferees of stock to not inherit causes of action for fraud and misrepresentation practiced upon their predecessors.

So far, none of the parties to this proceeding or the courts below cited any authority controverting the above statement of the law. The argument heretofore advanced rather naively is that if Cities chooses to give away a fund to Class A stockholders why do the Common stockholders complain?

The view taken by the District Court and the Circuit Court that the Public Common Stockholders Protective Committee are in effect interlopers and have no interest in the proceeding completely ignores the background of this proceeding and relies entirely upon the form rather than the substance of the subject matter and makes rulings by administrative agencies, however unjustified or illegal, not subject to review by courts of law.

II

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and *Otis* v. *S. E. C.*, 323 U. S. 624.

The judgment of the Court of Appeals was entered on May 28, 1953 (66a).

III

Questions Presented

1. May stockholders of equal contract rights be treated differently in a Section 11(e) reorganization solely on the basis of a legally fictitious "class" claim?

2. Where an administrative agency has misapplied legal principles and made erroneous findings as a result, is it not the right and duty of this Court to correct such action?

3. Can the Commission create rights in transferee stockholders when they inherited none from their predecessors as a matter of law?

4. Is the mere assertion of a claim and its approval by the Securities and Exchange Commission sufficient to require its settlement and payment under a plan of reorganization although it is invalid as a matter of law?

IV

Reasons For Granting the Writ

1. The decision of the Court of Appeals that the Public Common Stockholders Protective Committee has no interest in a settlement made upon an erroneous and nonexistent legal basis, merely because an administrative agency has approved the settlement, involves an important question of federal law which should be settled by this Court.

2. The decision of the Court of Appeals that equal classes of stockholders can receive disparate treatment in a proceeding for simplification under Section 11(e) of the

Public Utility Holding Company Act of 1935 is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

3. The rulings of the Circuit Court and the District Court, by approving the settlement upon an asserted claim which has no legal or equitable existence, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons petitioners urge this application for certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners,
Public Common Stockholders'
Protective Committee.

HAWKINS, DELAFIELD & WOOD,
FRANKLIN S. WOOD,
CLARENCE FRIED,
of Counsel.

Supreme Court of the United States

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of

ARKANSAS NATURAL GAS CORPORATION, CITIES SERVICE COMPANY, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY.

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of Judge Maris (5a) is reported at 109 F. Supp. 522. The opinion of the Court of Appeals (R., p. 66a) has not yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28, U. S. C. Sec. 1254(1).

Statement of the Case*

On December 4, 1951, Arkansas Natural Gas Corporation ("Arknat"), a registered holding company under the Public Utility Holding Company Act of 1925 ("act"), in a Section 11(e) proceeding filed an amended plan of reorganization (the original plan was filed on January 26, 1950).

In the course of the proceedings it appeared that Cities Service Company ("Cities") owned about 75% of the common stock, about 24% of the Class A stock and about 40% of the preferred stock of Arknat and dominated and controlled its affairs. (S. E. C. Findings & Opinion, 62a p. 3).

On October 1, 1952 the Commission approved the amended plan in its findings, opinion, and order (62a).

An application for an enforcement order was made to the United States District Court for the District of Delaware and on January 29, 1953 pursuant to the opinion of United States Circuit Judge Maris, who was sitting as a District Judge in Delaware (109 F. Supp. 522), an order approving and enforcing the plan of reorganization was entered. The opinion of the District Court, the order entered thereon, and the findings and order and opinion of the Commission appear on pages 5a, 6a and 62a, respectively, of the appendix hereto.

---

* References are designated as follows:

To the pages in the printed appendix (a);
To the transcript of the testimony (T.);
To filed papers (not printed) by description and date of filing, and
To exhibits (not printed) by their identifying exhibit numbers or letters.

On February 27, 1953, the Public Common Stockholders' Protective Committee (petitioners herein) filed a notice of appeal by which they sought to review the action of the District Court and of the Commission approving the amended plan which discriminated in the treatment accorded to the public common stockholders as against the public Class A common stockholders.

On May 28, 1953 the United States Court of Appeals for the Third Circuit without considering the merits affirmed the order of the District Court merely on the ground that the Public Common stockholders were not aggrieved.

The amended plan provides that Cities shall pay 25¢ per share to the public common stockholders of Arknat and $1.50 to the public Class A stockholders of Arknat in full settlement of all claims, whether asserted against Cities by the stockholders in a derivative capacity or otherwise. The rights of the common and Class A stockholders according to the charter provisions were identical except that the common stockholders had the right to vote.

The issue on this application arises from the marketing and public distribution by Cities of 2,500,000 shares of Class A stock in 1929.

The following are the facts leading up to the sale of the Class A stock.

Arknat was organized on April 4, 1928, by the merger of two wholly owned subsidiaries of Cities together with a third company controlled by the so-called Benedum-Trees interests in Pittsburgh who were not affiliated with Cities. Pursuant to the merger agreement Arknat issued preferred and common stock of which Cities received 28% and 60% respectively and the balance was issued to the Benedum-Trees group. The total amount of common stock issued was approximately 4,084,000 shares without par value.

In March, 1929, Arknat authorized the issuance of 4,000,000 shares of Class A stock having the same rights as the common stock except that the Class A stock had no vote.

In May, 1929, Arknat sold the first block of approximately 1,021,000 shares of the Class A stock to holders of its common stock on a rights offering at $4.00 per share at the rate of one share of Class A stock for every four shares of common stock (38a).

Later in the month Arknat agreed to issue to Cities on its call, for public distribution, 2,000,000 more shares of Class A stock as follows:

1,000,000 shares at not less than $5.00 per share,
500,000 shares at not less than $6.00 per share, and
500,000 shares at not less than $7.00 per share.

In September, 1929, Arknat further agreed to sell to Cities on its call the balance of the authorized Class A stock at not less than $15.00 per share, but of this balance Cities took down only 500,000 shares. This made the total number of Class A shares taken down by Cities for public distribution for Arknat 2,500,000. This 2,500,000 shares of Class A stock, together with the 1,021,000 shares issued on rights to the common stockholders as mentioned above, substantially accounts for the total of 3,522,521.25 shares of Class A stock issued and outstanding at the time of filing of the amended plan by Arknat mentioned above.

The facts in this regard are succinctly stated in the opinion of Judge Maris as follows:

> "There is no substantial dispute as to what actually occurred in the distribution. Cities took and distributed 2,500,000 shares of the Class A stock, all but approximately 479,000 of the shares which Arknat had undertaken to issue upon call by Cities. The marketing was handled by Cities through Henry L. Doherty

& Co., fiscal agent for Cities. Doherty through its salesmen operating out of its offices throughout the United States offered and sold Class A stock to customers at the closing price of the previous day on the New York Curb Exchange. Shares were sold for cash and on the installment plan; the salesmen received commissions only if the purchaser held the stock for 60 days or longer. Cities, through a subsidiary, was simultaneously trading heavily on the Curb *in both the Class A stock and the common stock,** with purchases vastly exceeding sales, priced and timed so as to effect a maximum inflation of the market prices on which sales of the Class A stock by Doherty & Co.'s salesmen would be based.

"On June 1, 1929, the Class A and common stocks were quoted on the Curb at about 8¾. Four months later, in September 1929, the Class A stock reached a high of 24⅝ and the common stock a high of 26.

"During that period Cities was taking down from Arknat the 2,500,000 shares of Class A stock referred to above, and through the Doherty salesmen was selling to the public those shares and additional shares purchased on the Curb. On September 7, 1929, Cities took down the last block of 500,000 shares actually to be issued. The buying and selling by Cities through Doherty & Co. and its other subsidiary continued through the end of 1930; the number of shares traded dropped sharply after the market break in October 1929, rose sharply after January 1930, and then dropped off during the latter part of the year. By the end of 1930, when the distributing operation was terminated and an accounting had, the price was down to $5 per share.

The 2,500,000 shares of Class A stock were sold through Cities to net Arknat an aggregate of $21,454,234,

* Italics added.

or an average of approximately $8.58 per share (Com. Exs. 1, 52, 64). Prior to the commencement of the public sale of this stock in June, 1929, the common stock of Arknat had been selling on the public market in New York at an average price for the month of May of 6⅞ dollars per share, or a high of 8⅝ and a low of 5⅛ dollars per share (Badger Ex. 9, 156a). As mentioned in Judge Maris's opinion quoted above, on June 1, 1929, both the Class A and common stocks of Arknat were quoted on the New York Curb Market at about 8¾ (Com. Ex. 66, 40a).

Of the present Class A stockholders, 5.89% purchased their shares from June to September 1929 and 13.6% purchased their shares from April 1929 to December 1930 (Cities Ex. 30, 46a). Stated conversely 94.11% of the present Class A stockholders purchased their shares since September, 1929 (which was both the peak and substantially the end of Cities actual market manipulation)[1] and 86.4% have purchased their shares since December 1930, when Cities' distributing operation was finally terminated and it made its final accounting with Arknat (Com. Ex. 64; Com. F. & O. 62a, p. 36). Accordingly the Public Common Stockholders' Protective Committee urged that (depending on whether the actual period of manipulation by Cities or the full theoretical period until its accounting is taken as the measure) either 94.11% or 86.4% of the present Class A stockholders have no possible claim against Cities based on its market manipulation and no basis for different treatment than the public common stockholders on that score.

---

[1] "Cities purchased and sold to the public in direct retail sales an amount of Class A stock considerably in excess of the total of 2,500,000 shares it took down from Arknat. Cities purchased in the open market 2,621,959 additional shares, and by the time the entire operation was terminated on December 31, 1930, it had sold a total of 5,506,195 shares. From May 29 through September 1929 alone, Cities sold approximately 4,045,000 shares" (Com. Findings and Opinion, p. 35).

Nevertheless at the insistence of the Commission (Cities strongly opposed the payment in its briefs before the Commission), the amended plan provides for the payment by Cities of 25¢ per share to all public common and Class A stockholders of Arknat in settlement of all general and derivative claims and an additional payment of $1.25 to the public Class A stockholders because of its above manipulation of the market in the public sale of Class A stock, on the following grounds (not always or consistently urged):

A. Cities breached a fiduciary obligation to the Class A stockholders (Com. F. & O. 62a, pp. 48-9).

B. Special equities existed in favor of the Class A stockholders (Com. F. & O. 62a, p. 49).

C. A class claim enured to the benefit of the Class A common stockholders (Com. F. & O. 62a, p. 49).

We submit that as a matter of law none of the foregoing can be justified.

Specification of Errors to be Urged

The Court of Appeals erred in—

(1) holding that the Public Common stockholders are not aggrieved by approval of the amended plan,

(2) approving the amended plan providing for disparate and discriminatory treatment between two classes of stockholders whose legal rights are identical, and

(3) approving a settlement on a non-existent and illegal basis.

ARGUMENT

Summary of Argument

The basic question presented by this petition is whether a determination by an administrative body is so sacrosanct that it will be immune from review by the Courts regardless of how unfounded the basis for that determination may be.

Concededly the charter rights of the two classes of stockholders are identical. There can be no dispute that a very small proportion of the present stockholders purchased their shares of stock during the time when the alleged personal wrongs were committed. There has been no successful refutation by any of the parties to this proceeding or in the opinions of the Courts below that the present transferee holders of the Class A stock inherited no rights of action for fraud in the original sale of stock from their predecessors.

As a matter of law, therefore, no basis exists for differentiation among the vast majority of the present holders of the Common and Class A Stock.

This and other federal courts have held that the adequacy of a settlement approved by the Commission cannot be reviewed or questioned, but that principle has here been distorted and misapplied because under the guise of applying that principle the Commission acted as a prize court and divided a fund upon an illegal basis.

There is no need to conjecture what might have happened if the proper legal principles were applied. Since the entire picture is out of focus the first problem is to establish the proper starting point and place the integral parts in proper perspective. It is no answer to assert that the Public Common stockholders are not concerned because Cities has now capitulated and adopted the Com-

mission's allocation of the settlement fund and a label of private settlement or gift has been attached to the result. In *Reed* v. *Allen*, 286 U. S. 191, 209, Mr. Justice Cardozo said:

> "The quality of the remedy is to be determined by the end to be achieved, and not by any label, whether restitution or ejectment.
>
> "A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow."

The foregoing applies with greater force in this proceeding because unless the blindfold is removed from the eyes of the Court so that the transaction may be recognized for what it is, the petitioners have no way out and are enmeshed in procedural rules and semantics which completely overlook the substance of the subject matter involved.

If the opinion of the Circuit Court is permitted to stand, unlawful discrimination among various classes of stockholders whose legal rights are identical will be fostered and the authority exercised by administrative agencies without any legal basis will go unchecked.

POINT I

The Common Stockholders are aggrieved.

The crux of the argument made by Cities, the Class A stockholders' committee and the Commission in the Court

of Appeals was summed up in the following last two paragraphs of the Commission's brief (p. 13):

> "The Common Committee objects only to the additional payment to be made under the plan to the Class A stockholders. This payment is to be made by Cities itself, and does not directly or indirectly reduce the participation of the public common stockholders in the estate of Arknat. No stockholder of Cities, and no class A stockholder of Arknat, contends that the settlement is either excessive or inadequate.
>
> "The common stockholders of Arknat have no legitimate concern with either the excessiveness or the inadequacy of the proposed payment by Cities to the class A stockholders, based upon the separate claims against Cities asserted on behalf of the class A stockholders as such. They would be affected by the settlement only if it were somehow related to an inadequate recognition of the corporate claims in which they have an interest. No such inadequacy is alleged, and there is no appeal from the decisions below that the plan includes a fair and equitable settlement of all corporate claims. In these circumstances, it is clear that the plan involves no discrimination against the common stockholders, and that the Common Committee has no legitimate concern with the payment by Cities to the class A stockholders provided by the plan."

For reasons already discussed we have not attempted to attack the Commission's determination with respect to the corporate claims, unfair and influenced as we believe that decision to have been by their determination with respect to the separate non-derivative, non-corporate so-called "class" claim of the Class A stockholders.

But when the Commission violates the legal right of the common stockholders to equal treatment with the A stockholders, not as a determination based on conflicting facts

but on a wrongful determination and misapplication of legal principles, the error is one of law and fully subject to review here, and the common stockholders who are by law entitled to equal treatment have been injured.

To say that the common stockholders would gain nothing if the claim of the Class A stockholders were to have been denied by the Commission begs the whole question. *As stockholders of equal right they were enttiled to equal treatment, and if they have been denied that on anything other than proper legal grounds, they have every right to complain and to seek correction of the injustice.*

We submit that the statements above in the Commission's brief that the Common stockholders are not concerned with, are not affected or injured by the separate payment to the Class A stockholders are completely sophistrous. If the Commission, and Cities at its bidding, can allocate payment to one of two legally equal groups of stockholders on the basis of "a class claim" which does not exist, then the Commission should be permitted to make any determination on any basis whether in accordance with legal standards or not under the guise of the magic words "approval of a settlement."

It is claimed by the respondents that the payment to the Class A stockholders is not at the expense of the Common stockholders and therefore they are not injured. Only the more naive will accept the inference that this gratuitous allocation to the group is not at the expense of the other.

The iteration and reiteration of a claim does not give it validity—at least we hope—and the mere characterization of it as a "class" claim does not make it so without some semblance of legal basis therefor. Absent some legal basis, the additional payment of $1.25 per share to the Class A stockholders is a gratuity and a windfall and as such a violation of the equal treatment of their rights that all other stockholders with equal contract rights are entitled to from both the Commission and this Court.

No one can honestly say that the payment is not at the expense of the Common stockholders, namely that by so much the amount payable by Cities on account of the admitted "corporate" claims of Arknat has not been reduced.

This is not a matter of largesse by Cities to be allocated as it and the Commission please, and if it were, as the sophistrous statement in the Commission's brief would infer, it could only be paid to all and not to some of those whose contract rights are equal.

Derivative corporate claims in excess of $50,000,000 were asserted in the proceedings before the Commission against Cities. If they were properly evaluated and the corporate wrongs redressed, the Common stockholders would undoubtedly have received a greater share. The president of Cities, Mr. Jones' concern about the total amount to be paid (18a) and the Commission's concern about punishing the wrongdoer and not permitting it to go scot-free[2] would still result in at least the same total payment, in which

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[2] At the argument held in Wilmington on November 21, 1952, the Commission's counsel told Maris, C. J. (p. 122):

> "The Court: What about the proposition that of this amount $1.25 is being awarded to the present owners of the Class A stock?
>
> "Mr. Isaacs: That, your Honor, is an inherent problem involved in all claims, whether corporate or class. In a world where things happen over a twenty-year period, you can't do perfect justice on a twenty-year old claim of damage to a class of security holders or damage to a corporation. Holders of the securities change, and *the basic problem is whether that is a reason for letting the wrongdoer go scot-free or whether you take as a theory that there is a class or corporate right to recovery and thus permit the present stockholders to stand in the shoes of their predecessors.* The common stock as well as the Class A stock has changed hands during this interval, Arkansas Natural as a corporate entity is disappearing before this money is to be paid. So you are really not paying anything to the corporation." [Italics supplied.]

event all public stockholders would have received slightly less than the $1.50 per share now paid solely to the Class A stockholders.

Mr. Ruch, in Cities brief before the Commission dated April 2, 1952, certainly considered the public Common stockholders aggrieved when he said (p. 48):

> "Moreover, in the process of penalizing Cities, the effect is simply to penalize the innocent public holders of its common stock."

Matter of Green Bus Lines, 166 Misc. 800 (New York Sup. Ct., 1937) furnishes an apt analogy to the situation here. An election of directors was attacked because it did not conform to law. The claim that the petitioners were not aggrieved because they supported defeated candidates and the result would still be the same if a new election were held, was disposed of as follows:

> "* * * In addition to the facts set forth they claim that petitioner is really disinterested in the proceeding, and brings the action on behalf of the defeated candidates for directer. Proof to support the contention is lacking. Even if it were present, it is hard to see how it can affect the situation. The requirements of justice, as intended in the statute, do not entitle a particular judge hearing the petition to determine whether or not the balance of equities or his own conception of fairness should determine the result. *What must be decided is whether the election has been held in accordance with the governing provisions of law."* (Italics added.)

In the instant case it is not difficult to predict what the Commission would have done or will do upon a remand if it cannot "take as a theory"[3] that a class claim could

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[3] See statement of Mr. Isaacs, n.2, p. 13.

be asserted and adjusted accordingly. The desire of the Commission to punish the wrongdoer and the willingness of Cities to settle all claims in a total amount would still be the important motivating considerations.

To accomplish the purpose of penalizing the wrongdoer so it would not go Scot-free an absurd and completely invalid legal ground was adopted: namely "You take as a theory that there is a class or corporate right to recovery and thus permit the present stockholders to stand in the shoes of their predecessors." The Commission could just as easily "take" the theory that the present stockholders are the adopted children of the original purchasers and therefore inherited their rights from their foster parent stockholders. The theory taken by the Commission is just as ridiculous and disregards *pari passu* treatment of stockholders of equal rank. The Commission's determination was made "not in accordance with legal standards"[4] but unless reversed by this Court will be conclusively binding on the petitioners.

In *Cohan* v. *Elder,* 118 F. 2d 850 (C. A. 9, 1941) the Court defined the meaning of the term "aggrieved" as follows:

> "* * * The word 'aggrieved' as used in the statute is doubtless to be understood in its legal sense, as in the case of a party who is aggrieved by an order made or action taken in a judicial or administrative proceeding which is binding on him."

See also *American Surety Co.* v. *Jones,* 51 N. E. 2d 122, 384 Ill. 222 and *Glas* v. *People,* 102 N. E. 763, 259 Ill. 332, where the Court said:

> "* * * a person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment."

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[4] *S. E. C.* v. *Central Illinois,* 338 U. S. 96, 126.

In *Pierce* v. *Gould,* 9 N. E. Reporter 568, the Supreme Judicial Court of Massachusetts said:

> "The common stockholders are concluded by the findings of the Commission unless reversed by this Court and by the same token have an interest in, are prejudiced by and are aggrieved because of the findings of the Commission and the order of the District Court."

In *Beachler* v. *Ford,* 60 N. E. 2d 330, 337, it was argued that the defendant was not an aggrieved person because he would have received a greater amount under the judgment but the Court said:

> "Whether the appellant E. T. Ford would be pecuniarily benefitted by the relief that might be afforded him on his appeals is not a proper test for determining whether he was 'aggrieved' by the judgments overruling his motions to vacate, but the true test is whether legal rights of the appellant were invaded by the orders overruling such motions."

In the present case the Commission violated the rights of the Common stockholders to receive *pari passu* treatment whether in the distribution of a corporate claim or consideration of private wrongs based on the same stock market manipulations in both stocks.

If the basis of the Class A claim is predicated on the common law rights of purchasers of stock in an inflated market because of fraudulent misrepresentations as both the Commission and the Class A stockholders assert, then by the same standards the public Common stockholders who purchased their stock in the same inflated market have a claim for which nothing has been paid and on that basis alone are interested and aggrieved parties.

If we could turn the clock back to 1929 and 1930 and assume that a common stockholder during said period brought suit against Cities because he paid $25 or $26 per

share due to the manipulation, fraud, and misrepresentations of Cities in the sale of common stock, would any reasonable person then have argued that (1) the common stockholder had no cause of action because Cities was principally engaged in the sale of A stock and the sale of common was merely an adjunct of such sales or (2) that the monies Cities received went into its own treasury whereas the monies received for the sale of Class A went into Arknat's treasury or (3) that no cause of action existed because by the sale of A stock the common stockholders who had their stock *prior to May 1, 1929* received a benefit by enhancement of their equity. Such defenses would then have been obviously insufficient. The passage of some twenty years does not make them better.

POINT II

The Court has the right and duty to examine the Commission's Conclusions of Law.

In his opinion Judge Maris, after reviewing the facts, the claims made by the Committees, and the purported settlement under the plan approved by the Commission states:

> "Before considering these contentions it should be noted that the problem presented to me is not to adjudicate the validity of the claims in controversy. The question is rather whether it was appropriate for the Commission to dispose of them through settlement under the terms of the amended plan rather than through the normal processes of litigation and, if so, whether the fairness of the settlement provided for by the amended plan is supported by substantial evidence."

We respectfully submit that this is an erroneous statement of the "problem presented" to both Judge Maris and the Commission.

We have not questioned the right of the Commission to adjudicate and settle claims, and we have striven to avoid having the issue here lost in the cloud of any such synthetic controversy.

We do vigorously oppose the right of the Commission to allocate the proceeds of a settlement upon a claim which has no legal basis or validity and accordingly cannot be said to exist, no matter how often or loudly reiterated by its proponents.

Neither Congress in the Public Utility Holding Company Act nor any decision of the Supreme Court or of any other federal court ever determined or indicated that the Commission could sit as a prize court to divide up booty. That is precisely what the Commission has done here. It is that power and right to divide spoils which the Commission is seeking to establish and maintain.

It is the failure of the Commission and the Courts below to face that issue that brings us here.

The findings of the Commission as to the facts on which the alleged claim is based may be sacrosanct, but its findings as to the legal consequences or rights of action flowing therefrom are not and accordingly are subject to the scrutiny and judgment of this Court.

As stated by Mr. Justice Frankfurter in the first *Chenery* case (*S. E. C.* v. *Chenery Corporation, et al.*, 318 U. S. 80), at page 87:

> "• • • Since the decision of the Commission was explicitly based upon the applicability of principles of

equity announced by the courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

And again at pages 89-90:

"* * * Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, *i. e.*, those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established legal principles."

In its opinion in *S. E. C.* v. *Cogan*, 201 F. 2d 78, 85 (Dec. 22, 1952), the 9th Circuit Court of Appeals holds likewise (p. 83):

"* * * the Commission was laying down a rule of law and making a determination of legal issues. Its decisions in that regard are subject to judicial review and determination."

The Commission having decided that the Class A stockholders were entitled to a disproportionate payment because there was (a) a breach of a fiduciary obligation from Cities to said Class A stockholders, (b) that a class claim could be asserted by them, and (c) that they were entitled to the rights of their predecessors in interest without a specific assignment, similarly laid down rules of law and made legal determinations which this Court is not bound to accept.

POINT III

The marketing of the Arknat Class A stock by Cities involved no breach of fiduciary duty to the purchasers.

The record here is abundantly clear as to the basis on which the Commission holds the Class A stock entitled as a class to the disparate payment of $1.25 per share. At page 48 of the Commission's findings and opinion (62a) it states that:

> "Turning to the class claim of the public Class A stockholders stemming from Cities' activities in marketing the Class A stock in 1929 and 1930, we find it clear from the record that the market prices paid by the purchasers of the stock were artifically inflated as a result of Cities' activities, which involved fraudulent misrepresentations and omissions and a manipulation of the market which would have been actionable under general legal principles apart from the relevant provisions contained in the Securities Exchange Act of 1934."

The cases relied on by the Commission are properly cited for the proposition that fraudulent misrepresentation in the sale of stock is actionable apart from the provisions of sections 9(a) and 15(c)(1) of the Securities Exchange Act of 1934 (but not by the purchasers' transferees some 25 years later, see Point IV (c), p. 1 *post*).

But the Commission then continues:

> "In our opinion such sale of Class A stock to the public *constituted a breach of fiduciary duty* to the purchasers as a class requiring equitable readjustment in this reorganization." (Italics added.)

This being the basis found by the Commission for the payment of the extra $1.25 per share to the public Class A stockholders, the validity of the payment must be judged by the correctness of that finding. As stated by Mr. Justice Frankfurther in the first *Chenery* case referred to and quoted above, "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

Here the Commission reveals the mistake which lies at the root of its difficulty. At the time of the sale of the Class A stock, Cities simply did not owe a "fiduciary duty to the purchasers as a class." At that time the purchasers did not exist as a class. Moreover, examining the marketing operation at the time of each sale, it is seen that the requisite elements of fiduciary relationship, *i. e.*, a beneficiary on the one hand, on the other hand a trustee, and between them a *res*, or subject of the pronounced fiduciary duties, were absent. Cf. *Gough* v. *Satterlee*, 32 N. Y. App. Div. 33 (1898); *Madget* v. *Madget*, 85 Ohio App. 18 (1949); *Inter-Ocean Casualty Co.* v. *Lecony Smokeless Fuel Co.*, 123 W. Va., 5411 (1941); 1 Restatement, *Trusts* § 74 (1935); Bogert, *Trusts*, 3, 502; all holding that a trust *res*, or property, is essential to a trust relationship. No *res* existed with respect to which buyer and seller were related as fiduciary and beneficiary. Cities (through its subsidiary, Henry Doherty & Co.) as seller, held the stock, which it offered for sale. The prospective purchaser held his money. There was no fiduciary relationship.

Only after the sale could it be said that Cities stood in a fiduciary relationship to the public holders of the Class A and then only because of its dominant position in Arknat. It could be said that after the sale, for example, Cities as controlling stockholder of Arknat, had a fiduciary duty not to waste the *res* of the relationship, *i. e.*,

the assets of the corporation, or mismanage the corporation to its injury. But Cities' activities after conclusion of the marketing operation is not the basis of the Class A claim.

At the time of the marketing operation, the relationship between Cities and prospective purchasers was simply one of buyer and seller. As to each prospective purchaser, Cities' duty was to refrain from making fraudulent misrepresentations. The Commission correctly points out that Cities did not do so. So the real questions involved are whether the initial purchaers of the Class A stock all suffered actionable injury, and if so, whether their rights of action were transferred to the present holders. These questions will be examined in Point IV of this brief.

The cases cited (62a p. 49) by the Commission (*Pepper* v. *Litton*, 308 U. S. 295, 307, and *American Insurance Co.* v. *City of Avon Park*, 311 U. S. 138, 146), in support of its theory that the sale by Cities of the Class A stock constituted a breach of fiduciary duty requiring equitable readjustment do not by any means support the Commission's theory.

The Commission's misconstruction of the applicability of *Pepper* v. *Litton* is apparently the same here as it was in the first *Chenery* case where this Court stated at page 85:

> "* * * to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"
>
> * * * * * * *
>
> "* * * The cases upon which the Commission relied do not establish principles of law and equity which in

themselves are sufficient to sustain its order. The only question in *Pepper* v. *Litton*, 308 U. S. 295, was whether claims obtained by the controlling stockholders of a bankrupt corporation were to be treated equally with the claims of other creditors where the evidence revealed a 'scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope,' 308 U. S. 25, 296."

The second case, *American Insurance Co.* v. *City of Avon Park*, cited by the Commission is similarly inapposite and inapplicable. There the fiscal agent under a plan for the composition of debts of a municipality under Chapter IX of the Bankruptcy Act, solicited assents to the plan without disclosing that it was acting in a dual capacity as a creditor of the municipality as well as its fiscal agent.

Following its above quoted finding as to a breach of fiduciary duty by Cities, the Commission next adverts to "special equities" possessed by the Class A stockholders. It is clear however that this finding is likewise based on the marketing by Cities of the Class A stock and is in effect merely a reiteration in different words of the previous finding (Com. F. & O. 62a, p. 49):

> "* * * As we have seen, the Class A stockholders possess special equities based on injuries resulting from the marketing by Cities of the Class A stock. * * *"

We submit that whatever wrongs may have been committed by Cities upon the original purchasers of Class A stock, no fiduciary relationship existed or was breached, and the individual and several causes of action at law for fraud and deceit accruing to the original purchasers are not involved in or properly a part of the present reorganization proceedings.

POINT IV

The Class A stockholders have no "class" claim.

The action of the Commission in arbitrarily diverting substantially all of the payment made by Cities to the Class A stockholders must stand or fall on the establishment of their right to a personal, non-derivative, "class claim."

The disparity in the aggregate amounts payable under the amended plan to the Class A stock and the Common stock is much greater than the six-times differential between the 25¢ and $1.50 per share payments. According to Cities Ex. 32 (49a), 2,612,171 shares of Class A would be entitled to receive the $1.50 per share payment, or an aggregate of $3,918,265.50, and 604,049 shares of Common would be entitled to receive 25¢ per share, or an aggregate of $151,012.25—or 96+% of the total claims payment to the former and 3.71% to the latter.

That it was the Commission and not Cities or Arknat which made the allocation can hardly be denied.

Mr. A. H. Weyland called as a witness on behalf of Ark-Nat in support of the Plan testified (13a).

> "It is my understanding that when Cities offered this $4,000,000, it was a compromise offer to Class A and common stockholders. They were offering that to settle all outstanding claims, whether stockholders' claims or corporate claims, or claims of any nature, and they were making it as a compromise offer to settle everything.
>
> "On that basis it suited me fine, since Arkansas was not putting any part of that $4,000,000."

Mr. Christian, Treasurer of Cities, similarly failed to evaluate any claim or to allocate any portion of the

$4,000,000 in settlement of a particular claim (14a). He was cross-examined at length and, after setting forth the general nature of the offer of compromise, testified as follows (T. 2986):

> "Q. Did you have any discussion or did you ever hear any discussion regarding any amount to be allocated to a particular claim in making up this $4,000,000? A. No, sir.
>
> Q. Who was it that made the determination that this $4,000,000 should be offered in settlement of the claim? A. I don't know who made the determination that that was to be 25 cents and $1.50.
>
> Q. I am sorry, I didn't hear that. A. I said I did not know who determined that 25 cents and $1.50 was the allocation.
>
> Q. Did you have any discussions with Mr. Jones after the meeting of November 9 regarding this offer of settlement? A. No, sir.
>
> Q. Did you have any discussions with Mr. Walker regarding this offer of setttlement? A. No, sir."

Mr. Jones, President of Cities Service, took refuge behind the attorneys who he claimed prepared the Plan, namely, Messrs. O'Brien, Weiner, and Ruch (T. 3220), but he personally, was unable to appraise the value of any particular claim. When questioned specifically on cross-examination as to the breakdown of the $4,000,000 offer of compromise he denied any knowledge whatsoever as to the component parts (T. 3233):

> "Q. You never received any breakdown of how this $4,000,000 was arrived at? A. No, I didn't. I told you that."

(P. 3229):

> "Q. Did you get any memorandum from the lawyers showing the maximum liability of any particular claim? A. I did not. I didn't ask for it.

Q. Did you ask them how they arived at the figure of $4,000,000? A. No, I don't think I did. I don't believe I asked them how they arrived at it. They told me that they had considered the character of all of the claims and felt that this offer in compromise was one that we could justify making."

Mr. Ruch, attorney for Cities, admitted on the argument before the District Court and in the Court of Appeals that Cities had objected to the differentiation between the Common and Class A stockholders and had asserted before the Commission that there could be no "class" claim for the A stockholders because only those few present holders who bought within the limited period of stock market manipulation could have any legal grievance. In accord with this Cities' main brief before the Commission forcefully stated (p. 46):

> "The claim that the holders of A Stock some 23 years later have an equity in the assets of Ark-Nat superior to that of the Common Stock is unsupported by any recognized rules of law or equity, and is also unsupported by any moral or ethical considerations. * * * Moreover, in the process of penalizing Cities, the effect is simply to penalize the innocent public holders of its common stock."

(a) Even the initial purchasers of Class A stock did not have a class claim; but rather separate actions for fraud and deceit.

So far as any purchaser of the class A stock during this period of the marketing operation suffered actionable injury, his remedy is in an action at law for fraud and deceit, which is necessarily a personal action. For on the one hand the remedies available to a successful complainant are several, *e. g.*, rescission or damages, and on the other hand the existence of the injury is particular to the plaintiff and consists in his reliance to his injury upon the fraudulent misrepresentation.

A convenient summary of the law on the point is set forth in 114 A. L. R. 1015, at page 1016, where the annotator says:

> "Class or representative suits to obtain the rescission of transactions based on similar frauds practiced by one defendant upon various, and commonly numerous, persons, have so often been held not maintainable that one may well doubt whether under any circumstances such a suit will lie. One of the basic difficulties is not merely that the various transactions are legally distinct, but that each case is, or at least may prove to be, to some extent different. Even where the false representations were exactly the same, the various persons victimized may have acted upon different opinions and beliefs as to the facts; one may have relied upon one supposed fact, another upon a different one, and some may have largely acted upon their own judgment as to business possibilities, etc. Furthermore, each has an election of remedies, all may not desire the same relief, and some may not be entitled to any relief. In some case the interests of the various victims may be conflicting."

In accord:

> *George Brenner, et al.* v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, 11 N. E. 2d 890 (1937).
> *Willcox* v. *Harriman Securities Corp.*, 10 F. Supp. 532 (S. D. N. Y. 1933).

Cases cited in Annotation, 114 A. L. R. 1015:

> *Wheatley, et al.* v. *A. I. Root Co., et al.*, 72 N. E. 2d 482 (Ohio Court of Appeals, Medina County, 1945).

One outstanding fact which seems to have been ignored by the Commission is that, 1,021,056.25 (plus 1,465 shares

on later adjustments) shares of the Class A stock were sold on rights to the Common stockholders at $4 per share. This amounts to almost ⅓rd of the total of 3,522,521.25 shares of Class A stock issued and outstanding and cannot now be segregated from the whole. The balance of 2,500,000 shares of A stock were sold by Cities Service Securities Co. over a period of months between June, 1929 and December 31, 1930, both through salesmen in the field and over the New York Curb market at prices ranging from $7.94 in June, 1929 to a high of $23.48 in September, 1929 and a low of $5.56 in December, 1930 (Com. Ex. 66), with the result that it can scarcely be said that the purchasers of these shares ever had any such uniform or generally similar claims that they can be said to have had a claim as a class, then or now.

At best, only the original Class A stockholders who purchased their stock in 1929 and still retain it, could be said to have the procedural benefit of a "spurious" class action under Federal Rules of Procedure with respect to their third party claim against Cities. *Zahn* v. *Transamerica Corp.* (3rd Cir., 1947), 162 F. (2d) 36; *Hackner* v. *Guaranty Trust Co.* (2nd Cir., 1941), 117 F. (2d) 95, 97-8; *Ayer* v. *Kemper* (2nd Cir., 1931), 48 F. (2d) 11, 14.

(b) No right of action for Cities market manipulation devolved upon Class A stockholders who are transferees of the original purchasers.

Assuming, for the purposes of argument that the purchasers of the Class A stock of Arknat from Cities in 1929 and 1930 could have been said to have had a class claim, it would of necessity have been based upon their individual personal claims against Cities and as such would now remain only in those present Class A stockholders who bought their stock at that time—any such claims would not devolve by operation of law from such purchasers to subsequent purchasers of the stock from them.

It is submitted that this is the basic fallacy of the proposed payment of $1.50 to the public Class A stockholders as against 25¢ to the public Common stockholders under the amended plan. *The fundamental distinction between personal or class claims, such as those which the purchasers of Class A or common stock during this period might have had or may still have (subject, of course, to the Statute of Limitations), and the derivative claims of Arknat as a corporation has been completely ignored, consciously or unconsciously.* Any payments made in settlement of the latter must legally and equitably be distributed to and among all of the stockholders equally and ratably in accordance with their contract rights *inter sese.*

At page 41 of its findings and opinion, the Commission states:

> "The Class A Committee further contends that the general rule is that, where a fraud claim is merely incidental to a subsisting property right which has been assigned, the right to sue for the fraud passes as an incident of the assignment."

The above is a flat misstatement of the law, as far as transfers of stock are concerned. It is interesting to note that the Commission recites but does not openly adopt this fallacious theory, although it does so indirectly because the result which it approves is of necessity predicated upon it.

In *Cook on Corporation* (Vol. II, 8th Ed., § 355, p. 1294), the author says:

> "A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased."

37 C. J. S., Fraud, Section 60(b), page 344:

> "A stranger to the transaction who does not claim under the party defrauded has no right of action.

> Thus where fraud occurred in the original sale of property, there can be no recovery for such fraud by a subsequent donee, grantee, trustee or purchaser."

The same rule was tersely stated in *Kennedy* v. *Benson*, 54 Fed. 836 as follows (p. 838):

> "The transfer of the stocks would not transfer the right of action for the damages caused by false representations. At common law, such a chose in action was not assignable, so as to enable the assignee to maintain an action at law in his own name thereon."

Also to the same effect:

Abel v. *Paterno*, 245 App. Div. 285 (1st Dept., 1935);

Elliott v. *Kern* (1928), 90 Ind. App. 453, 161 N. E. 662;

Huston v. *Ohio & Colo. Smelting & Refin. Co.* (1917), 63 Colo. 152, 165 Pac. 251;

Steele v. *Brazier* (1909), 139 Mo. App. 319, 123 S. W. 477.

Judge Leibell discussed and applied the foregoing rule of law *In re Associated Gas & Electric Co.*, 53 F. Supp. 107, 112 (S. D. N. Y., 1943), affirmed *sub. nom. Elias* v. *Clarke*, 143 F. (2d) 641.

Referring to Judge Leibell's above decision, the Commission in the Section 11(e) reorganization case entitled *In the Matter of Stanley Clarke, Trustee of Associated Gas & Electric Co.* (April 15, 1944, H. C. Rel. 4985), stated (p. 45):

> "* * * Judge Leibell * * * (as to original holders of certain securities) held that any right of rescission they might have was not available to others than Original Holders. * * * He pointed out that the instruments of assignment did not purport to transfer

> any rights other than those embodied in the * * * shares of stock themselves, and that these do not include a right of rescission for fraud practiced upon the assignor * * *.
>
> "On the basis of our independent consideration we concur in Judge Leibell's conclusions."

Neither of the Courts below, the Commission nor any of the parties to this proceeding have produced any legal authority to sustain the transfer of the choses of action possessed by the original purchasers without a specific assignment thereof which was accomplished here solely by administrative fiat. The challenge issued by petitioners to submit any such authority has yet to be met.

POINT V

Both classes of stockholders having equal contractual rights are entitled and required by law to receive equal treatment.

The two stocks here are identical in all respects except that the Common had voting rights for the election of directors and the Class A did not (Com. Ex. par. 6). Their contract rights with respect to dividends and assets are identical, and although the Commission and the Courts have held that in reorganizations under the Act charter rights are not controlling in the strict priority sense, nevertheless they are to be respected—and no case so far as known has held or even intimated that different shares of the same class (which the A and Common stock are here for all practical purposes) can be treated differently.

Discussing permissible classifications under a reorganization plan, *Finletter, Law of Bankruptcy Reorganization*, 1939, states (p. 467):

> "A Class A common stock with no voting rights but otherwise identical with Class B voting common stock is not a separate class."

The same authority further states that where there is such equality of legal claims there can exist no justification for a "difference of treatment in the plan or arrangement" (p. 465).

As this Court stated per Mr. Justice Douglas in *U. S.* v. *Joliet & Chicago R. Co.* (1942), 315 U. S. 44, 48:

> "All questions of the rights of creditors aside, there can be no doubt that a corporation may normally distribute its assets among its stockholders. When it undertakes to do so, its act is nonetheless a corporate act though its shareholders receive new contractual rights enforceable by them along against the transferee. That is to say, their right to receive the proceeds on the disposal of corporate assets are strictly derivative in origin. *The fact that the consideration is made distributive to them directly * * * does not alter the character of those rights.* In each case their claims to the proceeds flow from the corporation and are measured by the stake they have in it." (Italics added.)

The discrimination between the distributions here provided for the Class A and the Common stockholders is clearly violative of basic rules requiring parity of distributions and participation between stockholders of equal contract rights.

In *Standard Oil Co.* v. *Apex Oil Corp.* (1950), 190 Tenn. 376, 229 S. W. (2d) 775, 776, it was recently stated:

> "In making distributions to stockholders in corporate liquidations, no stockholder may acquire or gain a priority over another. * * * Stockholders have equal rights in the distribution of assets. * * *"

It is clear that contract rights of equality among stockholders may not be disregarded in a reorganization under

the Act as in any other statutory reorganization. Even were other pertinent precedents lacking, such controlling determination would follow *a fortiori* from the established rule that contract rights of priority may not be so disregarded. *Case* v. *Los Angeles Lumber Co.* (1939), 308 U. S. 106; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.* (1942), 317 U. S. 78. The principle remains basic to determination of rights of participation in the assets of corporations in reorganizations under Sec. 11 of the Public Utility Holding Company Act. *In re Standard Gas & Electric Co.* (1945), 59 F. Supp. 274, 279, aff'd in pt. (3rd Cir., 1945), 151 Fed. (2d) 326; *In the matter of Engineers Public Service Co.* (December 5, 1946), H. C. Rel. 7041; aff'd sub. nom. *S. E. C.* v. *Central-Illinois* (1949), 338 U. S. 96, 130.

This Court in *Otis & Co.* v. *S. E. C.* (1945), 323 U. S. 624, made it clear that the principle applies to plans for simplification under the Public Utility Holding Company Act, and suggests the Supreme Court's fundamental aversion to any attempt to use the simplification machinery of the Act to create a "windfall" for one group of stockholders at the expense of another (*supra*, p. 637). An unfair taking and a "windfall" to the recipient occurs where, as here, such result would be destructive of vested contract rights of equality among stockholders. *In the Matter of Engineers Public Service Co.* (December 5, 1946), H. C. Rel. 7041.

In the analagous situation of a reorganization under Section 11 of the Bankruptcy Act, it has been stated that an important criterion of the fairness of a plan is that "there is no subtle appropriation of the property of one group for the benefit of another if the plan be effected." *In re Midland United Co.* (D. C. Del., 1944), 58 F. Supp. 667, 685.

Unless the fallacies upon which the findings and opinion of the Commission with respect to the amended plan are

recognized and repudiated by this Court, the misappropriation and unfairness proscribed by the above cited cases will have been accomplished here.

Conclusion

The Commission's findings, made contrary to established legal principles, are not immune from review by merely calling the allocation, made by the Commission of the fund offered by Cities to settle all claims of any nature whatsoever, a "private settlement" and by affixing a "class suit" label to a legally non existent claim. The holding of the Court of Appeals that the Public Common stockholders are not aggrieved gives full effect to form and ignores substance and reality. The amended plan is discriminatory and illegal insofar as it permits unequal treatment of shareholders having equal charter rights and in that regard should be disapproved and remanded to the Commission for revision according to law.

Respectfully submitted,

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FILED
SEP 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION, CITIES SERVICE COMPANY, ARKANSAS NATURAL GAS CORPORATION, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY, CLASS A COMMON STOCK COMMITTEE, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT ARKANSAS NATURAL GAS CORPORATION CLASS A COMMON STOCK COMMITTEE, IN OPPOSITION

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Preliminary Statement

This brief is submitted by respondent Class A Common Stock Committee in opposition to the petition for a writ of certiorari of the Public Common Stockholders' Protective Committee of Arkansas Natural Gas Corporation (Common Committee).

Opinions Below

The opinion of the Court of Appeals is officially reported at 204 F. 2d 797 (R. p. 67a). The opinion of the District Court is reported at 109 F. Supp. 522 (R. 5a). The findings and opinion of the Securities and Exchange Commission (Commission), dated October 1, 1952, have not been officially reported, but are set forth in Holding Company Act Release No. 11511 (R. 62a).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. Sec. 1254.

Statute Involved

The statute involved is Section 11(e) of the Public Utility Holding Company Act of 1935 (the Act). The section is set forth in the Appendix hereto.

Questions Presented

1. Whether a common stock interest in a subsidiary that has received full parity treatment in the distribution of the assets of the company may complain of the action of the Commission in approving a proposal by the parent to pay a sum to each public Class A stockholder of the subsidiary in settlement of an alleged class wrong committed by the parent upon the public Class A stock.

2. Whether this Court will assume jurisdiction to issue directives to the Commission at the request of a petitioner who cannot benefit thereby.

Statement

A brief outline of the relevant facts suffices for present purposes.

The instant proceedings involve the reorganization, pursuant to the provisions of the Act, of Arkansas Natural Gas Corporation (Arknat), a registered holding company and a subsidiary of Cities Service Company (Cities).

In December 1951 Arknat and Cities joined in filing with the Commission an amended plan of reorganization for Arknat pursuant to the provisions of Section 11(e) of the Act.

The plan called for the redemption of Arknat's preferred stock issue and the distribution of all the remaining assets of Arknat on a parity basis to the common stock and Class A common stock which had equal rights except that the Class A stock did not have the right to vote.

During the course of the proceedings it had been asserted that Arknat had corporate claims against Cities arising out of certain challenged acts of Cities as controlling parent of Arknat. Under the plan Cities proposed to settle these corporate claims by paying out of its own funds the sum of $.25 per share to each public stockholder of Arknat.

Thus under the plan all public stockholders of Arknat shared equally in the assets of the corporation and in the proceeds of the settlement of the corporate claims asserted against Cities. Petitioner does not challenge the adequacy of the corporate settlement.

Finally this respondent asserted that the Class A stockholders it represented, had a class claim against Cities in that the Class A stock had been fraudulently induced by Cities to make a disproportionately large equity contribution to Arknat.

The facts that gave rise to this claim are detailed in the Commission's findings and opinion (R. 62a, pp. 40-42, 48, 49). We need refer to them only in briefest outline.

When Arknat was formed in 1928 all of the presently outstanding 4,000,000 shares of common stock were issued, of which Cities received 60%. Even after a substantial write-up of the assets, the book value of the common equity on December 31, 1928 amounted to $2.40 per share. It soon became necessary to raise additional capital, and as part of that effort, Cities, on behalf of Arknat, between March and September 1929, sold to the general public 2,500,000 shares of original issue non-voting common, known as Class A stock. This amount closely approximates the number of shares of Class A presently held by the public. Cities sold this stock through a corps of some 800 salesmen operating out of 29 branch offices throughout the country. The price to the purchaser was the closing market price of the stock on the New York Curb on the day prior to the sale and Cities fixed the Curb price through a monumental market rigging operation. During the period of the distribution the Curb price of the Class A stock, and hence the price paid by the public for the Class A stock concurrently sold by Cities salesmen, was artificially inflated from 7⅞ on March 29, 1929 to a high of 24¼ on September 24th. Cities remitted to Arknat a total of $21,448,373.69 and, as a result of having fraudulently procured the public Class A to pay a disproportionate amount for an equal, though non-voting, interest in Arknat, the book value of the common increased from $2.40 to $4.34 a share.

Clearly this was no corporate wrong to Arknat. On the contrary, it was a benefit to it, for as a direct result of Cities fraud, Arknat obtained more equity capital than it properly should have for the sale of the 2½ million shares of original issue stock. So, too, it was a benefit to the public common stockholders, and to Cities as a holder of

a majority of that issue, since the excessive capital contribution of the Class A inflated the value of each share of common.

And it is equally clear that Cities' fraud resulted in direct injury to the public Class A for that class had been induced to contribute equity capital far in excess of the equity stock interest accorded it.

Upon these facts this respondent contended that, within the principles enunciated by this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, 322, 323 and *Pepper* v. *Litton*, 308 U. S. 295, 308, recognition must be accorded the fact that, at the expense of the Class A interest, Cities had fraudulently procured an inflated equity interest in Arknat.

Under the amended plan Cities proposed to settle this claim, advanced on behalf of the Class A stock, by the payment by Cities, out of its own funds, of $1.25 per share to each public stockholder of Arknat.

It is this portion of the plan that petitioner asks this Court to review. Cities submitted that it was fair and equitable; this respondent contended that it was insufficient. It was found fair and equitable by the Commission and the District Court of Delaware, and the Court of Appeals was "satisfied * * * with the review of the merits of the plan in the district court" (R. 68a).

ARGUMENT

Summary of Argument

We do not propose in this brief to argue at length the merits of the claim asserted on behalf of the Class A as against Cities. Were that claim challenged before this Court by Cities or by the common stockholders of Cities,* the only persons possibly affected, we might need to do so, as originally we did before the Commission. But the only one who complains is petitioner, the Common Committee of Arknat. Petitioner contends that the Class A stock had no valid claim against Cities and that the Commission should not have approved any payment by Cities to the Class A stockholders in settlement of that claim. Petitioner urges that this Court should issue its writ to review that portion of the plan and advise the Commission of its error.

Since the issue before this Court is whether its writ should issue, we address ourselves solely to the basic reasons why the petition must be denied:

1. Since the public common received parity treatment in the distribution of the assets of Arknat and in the proceeds of the settlement of the corporate claims that Arknat had against Cities, the public common is not a party aggrieved and may not petition this Court to review the propriety of a payment by Cities in settlement of an asserted Class A claim as against Cities, whether or not that claim had merit.

2. Since the settlement payment has been made with the approval of the Commission and the District Court

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* We find it difficult to believe that petitioner does not realize (petitioner's brief pp. 13, 25) that Cities counsel in stating that to penalize Cities is to penalize "its common stock" referred to the common stockholders of Cities and not to the common stockhloders of Arknat.

and no party affected thereby has appealed within the time permitted therefor, the propriety of the payment is moot, and will not be reviewed by this Court.

I

The common stock of Arknat has received its full aliquot interest in the assets of the corporation and in the settlement by Cities of the corporate claim asserted on behalf of Arknat as against Cities. Petitioner does not challenge the adequacy of that corporate settlement. Instead, it asserts that the class claim advanced on behalf of the A stock was without merit and therefore a plan that permitted a payment by Cities to the Class A stockholders in settlement of that class claim, in addition to and exclusive of the corporate claim, is not fair and equitable. Thus petitioner does not contend that the common stockholders are entitled to more; it contends only that the A stockholders were entitled to less.

But even if we were to assume that the claim asserted on behalf of the Class A stockholders was without merit, petitioner lacks standing to raise that question before this Court, since the common stock has no possible concern with any settlement tendered and paid by Cities to the A stock. If the claim asserted on behalf of the Class A stock lacked merit, Cities alone would have been the party aggrieved by the settlement it offered to and consummated with the A stock. But Cities tendered the offer, does not now complain thereof and the time within which Cities or any Cities stockholder might have complained has long since expired. In no event is the issue one on which petitioner may be heard. It has no interest therein; it is not injured thereby, and consequently, it is not a party aggrieved.

> "If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court."
>
> *Hooker* v. *Burr,* 194 U. S. 415, 419.

The petitioner suggests that it is directly affected by Cities' payment to the Class A in that had Cities not made an offer to settle the Class A claim, it might have been willing to pay a greater sum in settlement of the corporate claim. The conjecture lacks factual support,* and, in any event, such idle speculations as to what might have been are not legally cognizable.

All that the Commission had before it or could consider was the definitive, written plan whereby Cities voluntarily proposed to settle the corporate claims by the payment of 25¢ to each public stockholder, and to settle the claim asserted on behalf of the Class A stock by the payment of $1.25 to each public A stockholder.

The corporate settlement had to stand or fall on its own merits. It was approved by the Commission and the District Court and is not now challenged by petitioner. It is pointless to conjecture whether had Cities offered less or nothing in settlement of the class claim, it might have offered more in settlement of the corporate claim and the Commission might have found such larger payment fair and equitable.

In the present posture of the proceeding, the settlement of corporate claims for 25¢ per share is fixed and immutable and the propriety thereof is not open to review.

---

* Testimony of Mr. Christian, an officer and director of Cities:

> "A. No. I think if you are compromising these claims, the Class A stockholders had claims which the common stockholders had no claim at all in.
>
> "You have to recognize that claim. That claim precisely is in connection with the sale of the Class A stock and the allegations that they provided more capital for Arkansas than did the common stockholders.
>
> "When you recognize that, which is not common to the common stockholders, then you must give some weight to it and that makes a difference in the amount that you are offering." (Transcript of Testimony, page 3026.)

"* * * this Court does not sit to decide arguments after events have put them to rest."

Doremus v. *Board of Education,* 342 U. S. 429, 433.

Whatever petitioner may believe, whatever personal pique it may have that the claim asserted on behalf of the Class A stock was also accorded recognition in the plan (though at the expense of Cities) is legally irrelevant. There is no place in appellate procedure for what has now become an exercise in "disinterested malevolence." (*American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, 358).

As to the payment by Cities in settlement of the claim of the A stock, petitioner is not a party aggrieved and therefore lacks standing in this Court to apply for a writ. (*Tileston* v. *Ullman,* 318 U. S. 44; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405).

II

What could be accomplished by a review by this Court? Nothing to the benefit of petitioner. Indeed, nothing to the benefit or detriment of any other party.

The adequacy of Cities' settlement of the corporate claims has been approved by the Commission and the District Court. No one has appealed therefrom and the time to do so has long since expired. Cities therefore cannot be compelled to pay anything more than the 25¢ per share for which it has already received an irrevocable absolution.

Nor has petitioner urged that Cities should be compelled to pay something to the common as against a class claim that the common has against it. Petitioner did not assert such a claim; on the contrary, it states affirmatively that no such claim exists.

Thus it has been finally adjudicated that the common stock has received everything to which it is entitled and no pronouncement of this Court could now grant it more.

As to the propriety of the payment by Cities to the Class A stock in settlement of the class claim, that too has been approved by the Commission and the District Court. Cities, before the Commission, was a proponent of the settlement. Neither Cities nor any stockholder of Cities has appealed therefrom and the time to do so has long since expired. The payment has been made and the payment is now irrevocable; Cities cannot now claim it back, nor could the Class A stockholders be compelled to return it to Cities. And even if that settlement could have been negated, the only result would have been to have given the A stock less; the common could get no more.

But petitioner urges that, nevertheless, since it was grossly improper for the Commission to permit a payment in settlement of a worthless claim, it is the duty of this Court to so declare.

Petitioner misconceives the judicial function. This Court neither advises nor admonishes Governmental agencies respecting their procedure except when an issue related thereto is presented by a party whose rights may be affected by the determination of this Court. (*Chicago and Southern Airlines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 113.)

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."
>
> *Amalgamated Asso.* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, 418.

> "And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law."
>
> "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested. * * * "
>
> *Coleman* v. *Miller*, 307 U. S. 433, 460, 462 (concurring opinion).

Since petitioner is not aggrieved by the result below and cannot benefit from any action of this Court, a justiciable controversy is not presented and the petition should be denied.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 11(e)

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

"Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

FILED
SEP 17 1953
HAROLD B. WILLEY, Clerk

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT CITIES SERVICE COMPANY IN OPPOSITION.

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Opinions Below.

The opinion of the District Court (R. 5a) is reported at 109 F. Supp. 522. The opinion of the Court of Appeals (R. 66a) is reported at 204 F. 2d 797.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 67a). The Petition for a Writ of Certiorari was filed on August 20, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

Where a plan of reorganization of a holding company approved under Section 11(e) of the Public Utility Holding Company Act of 1935 provides for ratable distribution of its assets among the stockholders and an additional payment by its majority stockholder out of its own assets directly to public holders of one class of stock in settlement of an alleged class claim or special equities of the latter against such majority stockholder, have the public holders of another class of stock standing to attack the approval of the plan on the sole ground that the class claim was invalid and the payment a windfall to the recipients, although a holding to that effect would not entitle the complaining stockholders to receive any more than they have already received under the plan?

Assuming *arguendo* an affirmative answer to the foregoing question, did the Commission have authority to approve a settlement of claims, including the settlement of said class claim, without adjudicating the contested issues of law and fact involved in the claims?

Statement of the Case.*

Arkansas Natural Gas Corporation (Arknat) was formed in 1928 by merger of a corporation controlled by Pittsburgh interests with properties owned by Cities

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* References (R.) refer to pages of the record; references (R. , p.) refer to the record page and the page or pages of a document of more than one page having only one record page number; references (R. 63a, Cit. App.) refer to pages of the Appendix to the Brief of Cities Service Company in the Court of Appeals, which appear between record pages 62a and 64a; references (Pet.) refer to the petition for writ of certiorari; and references (Br.) refer to the brief in support of the petition.

Service Company (Cities). By the terms of the merger agreement Cities received a substantial amount of Preferred Stock and 60% of the Common Stock, all of which it retained throughout (R. 62a, pp. 22, 23 and 43).

The new company embarked on a period of rapid expansion, which it financed in part through earnings and in part through the sale of a new Class A Stock, which was in all respects the same as Common Stock except that it did not have the right to vote (R. 5a, p. 2). The first block of Class A Stock was offered to the common stockholders and Cities took and paid for its proportion (R. 38a, 62a, p. 33). An additional 2,500,000 shares were marketed by Cities (through its wholly owned subsidiary) to the public and the net proceeds thereof were remitted to Arknat (R. 62a, pp. 33-34). In the process, Cities also increased its own stockholdings and on the effective date of the Plan owned about 75% (3,059,267 shares) of the Common Stock and about 25% (857,112 shares) of the Class A Stock (R. 62a, p. 3).

Arknat conducted its business substantially through two subsidiaries, Arkansas Louisiana Gas Company (Arkla) and Arkansas Fuel Oil Company (Arkfuel) (R. 62a, pp. 3, 53). Since the former was engaged in all phases of the natural gas business, including the distribution of gas at retail, it was a public utility company as defined by the Public Utility Holding Company Act of 1935 ("Act"). Arknat was therefore required to register as a holding company. Cities, by reason of this and other utility interests, was also required to register as a holding company.

In 1941 the Securities and Exchange Commission (Commission) began a proceeding under Section 11(b)(1) of the Act to determine what properties might be retained and what must be disposed of. A decision was rendered by the Commission in 1944 (In the Matter of Cities Service

Company and its Subsidiary Companies, 15 S. E. C. 962) which, so far as Arknat was concerned, in substance required it to dispose of either its utility business or its oil business (R. 62a, p. 4).

In 1949 the Commission commenced a proceeding under Section 11(b)(2) of the Act against both Cities and Arknat questioning the corporate structure and accounts of the latter, and setting forth many allegations concerning its past history. Both Cities and Arknat answered and later Arknat filed a plan intended to satisfy both the earlier order and the issues raised by the new proceeding (R. 62a, pp. 4-5). In substance the plan provided for merger of Arknat and Arkfuel, retirement of the Preferred Stock at the redemption price, and ratable distribution to Arknat's Class A and Common stockholders of the Common Stocks of the merged company and of Arkla (R. 62a, p. 5). This would effect a separation of the public utility business from the oil business in compliance with Section 11(b)(1), and would eliminate both the holding company and the non-voting stock in compliance with Section 11(b)(2) (R. 62a, p. 7). Lengthy hearings were thereafter held, largely devoted to a minute examination by the Commission's staff of all dealings between Cities and Arknat and primarily the marketing of the A Stock, with a view to showing that there were potential claims against Cities which should be taken cognizance of in the proceeding—these being issues raised by the order which commenced the proceeding.

These alleged claims were of two types. On the one hand there were transactions which it was alleged gave rise to ordinary corporate claims in favor of Arknat against Cities which, if established, would of course redound to the benefit of both the Common or Class A stockholders without distinction. On the other hand, it was charged that in the marketing of the Class A stock Cities had been

guilty of fraud, misrepresentation and breach of fiduciary duty to those stockholders; and as to this claim (sometimes called the "class claim") it was asserted—and later found by the Commission—that Arknat and its Common stockholders, far from being the victims, in fact shared in the benefits through the allegedly excessive prices obtained for the Class A stock from the public (R. 62a, pp. 19, 49).

After some 2,600 pages of testimony had been taken and more than 230 exhibits introduced at the hearings held intermittently over a period of eight months, Cities deemed it advisable to make an offer to settle the alleged claims against it and thereupon joined with Arknat in filing an amended plan (hereinafter called the "Plan") (R. 62a, p. 5). Its new feature was an offer by Cities to compromise all claims by payment of $1.50 per share to public holders of Class A Stock and 25¢ per share to public holders of Common Stock. The offer was intended and has been treated throughout by all parties as a payment to all of the stockholders of 25¢ per share in settlement of the corporate claims, and an additional payment to the holders of Class A Stock of $1.25 per share in settlement of the so-called class claim (R. 62a, pp. 50-51).

Hearings were resumed. The Class A Committee contended that each figure was inadequate, whereas the Common Stock Committee contended that the "corporate claim" figure was inadequate and all stockholders should be paid more on that account, but that there was no basis for different treatment of the two classes of stock because there was no valid class claim (R. 62a, p. 20). The Commission found that the settlement was fair and equitable and entered an order approving the Plan. The Commission then applied to the United States District Court for the District of Delaware for an order of enforcement, as pro-

vided in Section 11(e) of the Act. The two committees again urged their objections to the settlement, but Maris, J. (sitting by special designation) likewise found that the Plan, including the settlement of claims, was fair and equitable and entered an enforcement order (R. 5a-11a).

In the Court of Appeals, the present Petitioners were the sole appellants, and their appeal was limited to that part of the Plan which provided for the settlement of the class claim or special equities of the holders of Class A Stock. The Court of Appeals affirmed the order of the District Court, stating that Petitioners were not aggrieved by and had no standing to complain of the part of the settlement appealed from, and also that it was satisfied with the review of the merits of the Plan by the District Court (R. 68a).

The enforcement order required that the Plan be consummated unless a stay was granted. Since no stay was obtained, Arknat and Cities consummated the Plan, including the claims settlement (R. 70a). On April 8, 1953, Cities sent to the Arknat stockholders checks in the amounts provided in the Plan to meet the terms of the settlement, of which nearly 99% of the approximately $4,000,000 thus payable have been cashed.

ARGUMENT.

Summary of Argument.

The questions which Petitioners seek to have this Court consider are not actually involved in the case. The actual issues below were neither novel nor difficult. The unanimous decisions below were in accordance with well-settled principles and manifestly just. The courts below properly held that Petitioners have no standing to complain in any event.

POINT I.

The Court below was correct in holding that Petitioners have no standing to attack the provision of the Plan for the settlement by Cities of the alleged class claim of the Class A stockholders because the holders of the Common Stock are not affected or aggrieved thereby.

The Commission found and concluded that the proposed payment by Cities of 25¢ per share to both the A Stock and the Common Stock in settlement of all corporate or derivative claims was fair and reasonable and approved the settlement (R. 62a, p. 50), and the District Court held that the Commission's findings and conclusions were supported by substantial evidence and were in accordance with law (R. 5a, p. 7). The Petitioners did not appeal to the Court of Appeals from this holding (Pet. 4) and expressly disaffirm any intention of asking this Court to review this holding (Br. 10).

Petitioners do not contend that they have any rights or claims against Cities other than their interest as stockholders of Arknat in the so-called corporate or derivative claims and, recognizing that they are bound as a matter of law by the holding above-mentioned, Petitioners are making no direct attack on the fairness of the settlement of the corporate claims. Their only contention is that the A Stock should not have been paid anything in settlement of the class claim.

This immediately raises the question of how the Petitioners can have a legitimate concern with the wholly separate settlement between Cities on the one hand and the Class A stockholders on the other hand. The payment of the additional amount by Cities to the A Stock in no way

decreased or affected the amount payable to the Common Stock. If, as Petitioners contend, such payment should not have been made because the class claim had no valid legal basis, a holding to that effect would merely entitle Cities to attempt to recover from the nearly 20,000 holders of A Stock the sums paid to them in settlement of such claim; it could not entitle the holders of Common Stock to receive more than the 25 cents per share already paid to them in settlement of the corporate claims. Cities, as the proponent of the settlement, is, of course, not complaining. It follows that the Common Stock is not injured or aggrieved by the settlement with the A Stock and the Court of Appeals properly so held.

Faced with this inescapable conclusion, Petitioners advance a number of arguments in an attempt to establish that the holders of the Common Stock are aggrieved:

(1) Petitioners assert (Br. 10-11) that the settlement violates the legal principle that stockholders with the same contract rights are entitled to ratable distribution of the assets of the enterprise. This principle was in no way violated here. The ordinary assets of the enterprise consisted of the stocks of the two subsidiaries and these have been distributed ratably. The other asset of the enterprise —the corporate claims—has likewise been distributed ratably through the payment to each stockholder of the identical amount per share in settlement thereof. The additional payment to the A Stock in settlement of their class claim was made by Cities out of its own assets. Since such payment in no way diminished the assets of the enterprise or the interest of the Common Stock therein, the doctrine appealed to has no application.

(2) Petitioners assert (Br. 11, *et seq.*) that if Cities and the Commission had understood the invalid character

of the class claim, Cities, nevertheless, might have offered the same aggregate amount in settlement to be applied solely to the corporate claims, and that the Commission would have approved such a settlement as fair and equitable both to Cities and to the stockholders of Arknat. This suggestion does violence both to the business judgment of Cities and the integrity of the Commission. The validity or invalidity of the class claim was completely irrelevant to the merit or lack of merit of the corporate claims. The fairness of the settlement of each was separately considered and determined on the basis of its own merits (R. 62a, pp. 19-51). Having urged no objection on appeal to the settlement of the corporate claims, the Common Stock Committee certainly has no standing to ask for a remand on the irresponsible suggestion that the Commission's findings and conclusions with respect to those claims may have been improperly influenced by its findings and conclusions with respect to the class claim.

(3) Petitioners assert that in fact Cities offered a total sum in settlement of all claims against it; that "it was the Commission and not Cities or ArkNat which made the allocation" (Br. 23); that the allocation of 25¢ per share to the Common and $1.50 per share to the A Stock was made by the Commission "as a prize court to divide up the booty" (Br. 17) and not by Cities; and that the Commission arbitrarily diverted "substantially all of the payment made by Cities to the Class A stockholders" (Br. 23), using the so-called class claim merely as a convenient excuse for that purpose.

This fanciful description is, of course, directly contrary to the facts. The first mention of settlement was in the Amended Plan filed by Cities and Arknat which contained the offer as mentioned above. This offer already contained

the full terms of the proposed settlement of the respective claims. It left nothing for the Commission to allocate and the proceedings before the Commission thereafter were directed solely to the question as to whether the offer was fair and equitable. Both the Commission and the District Court, in their consideration of the fairness of the settlement, treated the offer for what it was, to wit: a unilateral offer by Cities to compromise alleged claims asserted against it (R. 62a, p. 5; R. 5a, p. 4).

Petitioners (Br. 23-25) claim to find support for their version in the fact that certain officers of Cities or Arknat testified that they had no part in the preparation of the offer of settlement or were concerned only with the aggregate amount that Cities would be required to pay. The actual situation was clearly stated by Mr. Jones, President of Cities, who testified (R. 63a, Cit. App. 3a):

> "Q. Mr. Jones, did you make the determination that the $1.50 would be paid directly to Class A stockholders and 25¢ directly to the Common stockholders? A. No, I did not. I relied upon the legal counsel to consider the merits of these various claims and they did that job themselves.
>
> Q. Neither you nor anyone else in your Company made that suggestion? A. No, sir. The recommendation was made—I approved it when it was made but I did not have anything to do with the determination of it because I do not feel that I was in a position to pass on the merits of these legal questions that were raised."

Petitioners appear to nurse a sense of injury that it was counsel rather than the client who formulated the settlement offer. While we are unable to see any possible relevance, we suggest that in practically all cases involving complicated legal and factual issues, counsel is relied upon

for judgment as to the desirability and character of settlement. That Cities' officers were aware of the nature and potential seriousness of the Class A claim is shown by the testimony of Mr. Christian, Cities' Secretary and one of the principal witnesses (R. 63a, Cit. App. 2a).

The only other basis referred to by Petitioners for their version of the facts are assertions (Pet. 2) that "before the Commission, Cities resisted this discrimination between the two classes of stockholders and asserted that both classes should be afforded identical rights in accordance with the charter provisions" and "Thereafter, before the District Court, Cities accepted the Commission's decision and joined with it in asking enforcement of the Plan, * * *". And again (Pet. 4) "Cities from the beginning resisted any such allocation * * *."

These and similar statements by Petitioners are entirely disingenuous and give a completely false impression.

The simple facts are that until the settlement offer was made, Cities resisted all claims asserted against it, and argued that Arknat's assets should be distributed ratably to all stockholders including Cities. After it made the offer, Cities of course did its best to get the offer approved; it did not object to the differentiation in treatment of the two classes and it would, in fact, have been absurd for it to raise such objection to its own offer.

The sources referred to by Petitioners in support of their version of Cities' position are a quotation from Cities' brief before the Commission and supposed admissions in oral arguments in the Courts (Br. 25). Petitioners' confusion arises from their failure to recognize that Cities, in supporting the adequacy of its offer of settlement, was required to set forth the defenses which it would urge in the event of final adjudication on the merits. This Cities

did with respect to all the claims asserted—both corporate and class. The passage quoted by Petitioners from Cities' brief was part of such statement of defenses. We did not think that our purpose could be misunderstood, for that brief concluded with the following statement (R. 63a, Cit. App. 4a):

> "We feel confident that consideration of the nature of the claims and of the defenses thereto will lead to the conclusion that the terms of the compromise are generous to the holders of the A and Common Stock and represent an acceptable basis of disposing of these claims and thus terminating this lengthy reorganization proceeding and enabling the properties to resume the successful prosecution of their respective businesses without the uncertainties and difficulties arising from further litigation regarding these matters."

It is clear, therefore, that Petitioners are not aggrieved and have no standing to seek review in this Court.

POINT II.

Assuming *arguendo* that Petitioners be permitted to attack the compromise settlement of the special equities or class claim of the A Stock, the considerations upon which the Commission based its approval of such compromise, affirmed by the Courts below, were in accordance with established and uniform practice and precedents, and present no issue warranting review by this Court.

The Petitioners contend that the only remedy of the A Stock for the activities of Cities in marketing the A Stock lies in suits against Cities for damages or rescission by purchasers of such stock who claim to have been deceived

by the alleged fraud; that such claims do not pass to subsequent transferees of the stock by mere sale of the stock and assignment of the certificates; and that there is no such thing as a class claim of the A Stock which can be recognized in this proceeding.

As previously stated, Cities urged these same contentions in resisting these claims and later relied on them in support of the adequacy of its settlement offer. But neither principle, precedent nor sound administrative practice required it to conduct war to the uttermost. Despite its contentions, Cities was obliged to consider the costs and risks of litigating these issues to a final conclusion, including the risks of injury by delay to the enterprise itself (of which Cities owns the major portion). In making the offer of settlement Cities did not change its position but, as in all such offers, proposed an alternative to ultimate adjudication. This is equally true of both the corporate claims and the class claim of the A Stock. Petitioners inconsistently concede the propriety of settling the corporate claims without adjudication, but insist that a final adjudication of the class claim would be in favor of Cities and that therefore it is not a proper subject of settlement.

As we read the Commission's findings, it did not undertake to adjudicate the issues raised by any of the claims. It specifically repudiated such an approach—"In considering the claims asserted against Cities, 'we are not called upon to adjudicate the merits of or to assign a specific monetary value to each particular claim.' " (R. 62a, p. 42.) Recalling particularly that both aspects of the settlement were under attack as inadequate, the Commission carefully reviewed each claim and the defenses thereto and then indicated what elements of the claims including the Class A claim had in its opinion "sufficient merit to require recognition" (R. 62a, p. 42) in a settlement proposal, and con-

cluded that the proposal was adequate as a compromise of all claims worthy of consideration (R. 62a, p. 50).

This has been the invariable practice of the Commission in dealing with proposals to settle alleged claims, and it has been repeatedly approved by the Courts. As stated in *In re North American Light & Power Co.*, 170 F. 2d 924, (C. A. 3, 1948), at page 933:

> "It would be anomalous, indeed, were the Commission to have on the one hand authority to approve a settlement, and be required, on the other hand, to go through the motion of adjudicating the very subject of the settlement. We are here in agreement with the observations of the Court in *Ladd* v. *Brickley, supra,* at page 221 of 158 F. 2d;
>
> 'What was before the Court? It was not the decision upon the facts or law involved in the two lawsuits. * * * It was the determination of whether or not in view of all the issues involved in those cases the settlement was for the best interests of the estate being administered under its direction.' "

See also the authorities cited by the District Court below (R. 5a, p. 4).

The cases cited by the Petitioners (Br. 17-18) for the proposition that the courts will review the Commission's determinations of legal issues and will reverse them if erroneous, are not in point because in those cases there was no compromise settlement of disputed issues but decisions by the Commission based on erroneous determinations of settled judicial doctrines.*

The Commission was therefore following well established precedent in considering and approving the settle-

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* It is therefore unnecessary to consider whether these cases have been limited or modified by the second *Chenery* case, *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194.

ment of the asserted claims rather than requiring final adjudication of their validity. The District Court was clearly correct in holding that "the findings and conclusions of the Commission are supported by substantial evidence and are in accordance with law" (R. 5a, p. 7); and the Court of Appeals was properly "satisfied * * * with the review of the merits of the plan in the district court * * *" in addition to being "clear in its own collective mind that this appellant has no standing to complain of it in any event." (R. 68a). We submit that these rulings do not warrant further review.

Conclusion.

The petition is entirely without merit and should be denied.

Respectfully submitted,

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Dated September, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission, dated October 1, 1952, are not yet officially reported and are set forth in the Commission's Holding Company Act Release No. 11511 (R. 62a).[1] The opinion of the Court of

[1] The symbol "R" refers to petitioner's appendix to its brief in the court below. The Commission's findings and opinion follow page 62a of the record and the district court's opinion follows page 5a, with the original pagination retained in the record filed in this Court. Accordingly, record references to the opinions of the Commission and the district court will be made to pages 62a and 5a, respectively, of the record, followed by the specific page in the opinions.

Appeals for the Third Circuit (R. 67a-68a) is reported at 204 F. 2d 797. The opinion of the district court (R. 5a) is reported at 109 F. Supp. 522.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 28, 1953 (R. 66a). The petition for a writ of certiorari was filed on August 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Where a plan for the reorganization of a registered holding company, pursuant to Section 11(e) of the Holding Company Act, provided for the *pro rata* distribution of new common stocks and cash to the holders of two classes of stock having equal rights in assets and earnings, and where claims had been asserted against the dominant stockholder of said company by public holders of one of said classes of stock, does a provision in the plan for settlement of said claims through additional cash payments by the dominant stockholder to the public holders of said class of stock render the plan unfair to holders of the other class of stock?

STATUTE INVOLVED

Section 11(e) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79k(e) provides in pertinent part:

> In accordance with such rules and regulations or order as the Commission may deem

necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. . . .

STATEMENT

Arkansas Natural Gas Corporation ("Arkansas-Natural"), a registered holding company prior to consummation of the plan herein, is a subsidiary of Cities Service Company ("Cities"), also a registered holding company. Arkansas-Natural owned all of the outstanding common stocks of Arkansas Louisiana Gas Company ("Arkansas-Louisiana"), a gas utility company, and of Arkansas Fuel Oil Company, a non-utility company. Arkansas-Natural had outstanding the following securities: (a)

2,188,000 shares of preferred stock, of which Cities owned about 40%; (b) 4,081,000 shares of common stock, of which Cities owned about 75%; and (c) 3,522,000 shares of Class A common stock, of which about 24% was owned by Cities. The charter rights of the common and the Class A stocks were alike in all respects except that the latter had no voting rights (R. 62a, 3-4).

The Commission and the district court approved a plan for the reorganization of Arkansas-Natural pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935; the Court of Appeals affirmed the District Court order. The plan, which has been substantially consummated, provided for the merger of Arkansas Fuel Oil Company into Arkansas-Natural under the name of Arkansas Fuel Oil Corporation ("Arkansas-Fuel"), and for the distribution of the common stocks of Arkansas-Louisiana and Arkansas-Fuel pro rata to the holders of common and Class A stocks of Arkansas-Natural, including Cities. The plan further provided for a cash payment by Cities of about $4,070,000 to the public holders of the common and Class A stocks of Arkansas-Natural. Of this amount, approximately $805,000, or 25¢ per share, was distributed to the public holders of these stocks in settlement of derivative or corporate claims asserted on behalf of Arkansas-Natural against Cities. The balance of about $3,265,000, or $1.25 per share, was paid by Cities exclusively to the public class A stockholders, in settlement of the separate claims asserted against Cities on behalf of

the Class A stockholders as such (R. 62a, 50-51).[2] It is this aspect of the plan to which the petition herein is directed.

The facts upon which the Class A claims are based are discussed at length in the Commission's findings (R. 62a, 33-42, 46-51) and are summarized in the opinion of the district court (R. 5a, 2-3). It appears that in March 1929 Arkansas-Natural authorized the issuance of 4,000,000 shares of the Class A stock. In May of that year about 1,021,000 shares of this stock was sold by Arkansas-Natural to holders of the common stock on a rights offering at $4 per share.[3] Later in that month Cities began a market manipulation through which 2,500,000 additional shares of Class A stock were distributed to the public. Through heavy trading on the New York Curb Exchange, with purchases vastly exceeding sales, the quoted prices of the class A common stocks were greatly inflated, and the Class A stock was distributed to the public at these manipulated prices. Arkansas-Natural received about $21,450,000 for the 2,500,000 shares of this stock, or approximately $8.58 per share, and the Class A stockholders paid some $13,000,000—or over $5 per share—more than the amount received by Arkansas-Natural, the excess representing the cost of the

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[2] Excluded from participation in the settlement are those who along with Cities shared the responsibility for the organization, initial financing, and subsequent management of Arkansas-Natural.

[3] Arkansas-Natural had been organized in April 1928 and all of its common stock was issued at that time, with Cities acquiring 60% thereof (R. 5a, 2).

marketing operations, including the manipulative activities. Principally as a result of these operations, the book value of the Arkansas-Natural common stock was increased from $2.40 per share as of December 31, 1928, to $4.34 per share as of December 31, 1930, when the distribution of the class A stock ceased.

On the basis of the record the Commission found that the market prices paid by the purchasers of the Class A stock "were artificially inflated as a result of Cities' activities, which involved fraudulent misrepresentation and omissions and a manipulation of the market which would have been actionable under general legal principles," and that "such sale of Class A stock to the public constituted a breach of fiduciary duty to the purchasers as a class requiring equitable readjustment in this reorganization" (R. 62a, 48-49). The Commission concluded that the payment by Cities of $1.25 per share, or a total of about $3,265,000, was a fair settlement of the claims of the Class A stock (R. 62a, 50-51). The district court, which approved and enforced the plan, agreed with the Commission's determinations (R. 5a, 6-7). The Court of Appeals affirmed (R. 67a-68a).

ARGUMENT

Petitioners do not here, and did not in the court below, contend that the plan failed to accord the full equitable equivalent of the rights of the public common stockholders of Arkansas-Natural, including a fair settlement of the corporate claims of Arkansas-Natural against Cities (Pet. 10). They

urge only that the public Class A stockholders had no valid basis for additional compensation at the expense of Cities and that Cities' undertaking in the plan to pay to the Class A stock by way of settlement something more than was paid to the common stock somehow or other violated the contractual rights of the public common stockholders.

The plan gives full recognition to the contractual rights of the common and Class A stocks in that parity treatment is accorded to both classes of stock in the assets and earnings of Arkansas-Natural. As noted above, under the plan the common stocks of Arkansas-Louisiana and of Arkansas-Fuel have been distributed pro rata to both classes of stock. Identical treatment is also accorded to the public common and Class A stockholders in regard to the payment by Cities of 25¢ per share in settlement of all corporate and derivative claims for wrongs allegedly committed by Cities against Arkansas-Natural. Petitioner did not question below, and does not question here, the adequacy of the settlement of these claims.

The settlement, under which the public holders of the Class A stock received $1.25 per share, was based upon separate claims against Cities asserted on behalf of the class A stockholders as such, and since this payment was made by Cities itself, and not out of the assets of Arkansas-Natural, it does not in any way reduce the participation of the public common stockholders in the assets of their corporation. In relation to the claims asserted by the Class A stockholders against Cities, petitioners

herein as representatives of the common stockholders do not have, as stated by the court below, "any more standing to complain than would any stranger on the street who read about the litigation and disapproved the result" (R. 68a).

Petitioners further contend that the initial purchasers of Class A stock did not have a class claim against Cities and that in any event no right of action by the original purchasers passed to their transferees (Pet. 25-30). Petitioners also question whether any fiduciary duty was violated by Cities to the purchasers of the class A stock (Pet. 19-22). These issues were properly raised by Cities and the contrary was asserted by the Class A stockholders (R. 62a, 41). The decision by Cities not to press these contentions, but rather to settle the claims asserted against Cities on behalf of the public Class A stockholders, is of no legitimate concern to petitioners.

Further, the mere fact that defenses might have been asserted by Cities against the claims of the Class A stockholders does not preclude approval of the settlement. In approving the settlement neither the Commission nor the district court was required to adjudicate the merits of any of the contentions for or against the claims asserted. As noted by the Commission, the activities of Cities give rise to actionable claims (R. 62a, 48); and it appears that a "spurious class action" on the basis of such claims could now be maintained in the federal courts, *Zahn* v. *Transamerica Corp.*, 162 F. 2d 36, 49-50 (C.A. 3); *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387

(C.A. 2). Nor is it by any means settled law that successors to the original purchasers of the Class A stock were precluded from bringing suit as transferees of such stock. *Cf. Phelan* v. *Middle States Oil Corp.*, 154 F. 2d 978, 999-1002 (C.A. 2). Moreover, in a proceeding under Section 11(e), in which the Commission is exercising, subject to court review, powers and duties analogous to the equitable jurisdiction of a bankruptcy court, it is the duty of the reorganization tribunal to adopt an appropriate equitable remedy for misconduct by the controlling stockholder. *Cf. Pepper v. Litton*, 308 U.S. 295, 304; *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U.S. 138, 146. The settlement of such claims, rather than litigation on the merits, is an appropriate equitable remedy. *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C.A. 2). On appeal, the only issue was whether the settlement was unfair to the public common stockholders of Arkansas-Natural. These stockholders, as we have seen, were not injured by Cities' distribution of the Class A stock, and as the payment under the settlement was made by Cities out of its corporate funds, the plan affected no rights of the stockholders whose interest petitioners represent.

CONCLUSION

The petition for a writ of certiorari asserts no conflict of decision and is devoid of merit. Accordingly it should be denied.

Respectfully submitted,

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SEPTEMBER, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 873009 949

FILED
OCT 15 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1953

DOCKET NO. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION,

Petitioners,

v.

SECURITIES & EXCHANGE COMMISSION, CITIES SERVICE COMPANY, ARKANSAS NATURAL GAS CORPORATION, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY, CLASS A COMMON STOCK COMMITTEE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS, PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION

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Supreme Court of the United States

OCTOBER TERM 1953

DOCKET NO. 275

IN THE MATTER

of

ARKANSAS NATURAL GAS CORPORATION, CITIES SERVICE COMPANY, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY.

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Petitioners.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The two principal arguments advanced in the respondents' briefs here are that the Arknat Common Stockholders are not aggrieved parties and in any event can recover or gain nothing on this appeal. If this were a simple case of two equal heirs of an estate, the only asset of which was a claim or claims against an insurance company, and the latter had contrived with one of the heirs to pay him a large additional amount on the side on the purported basis of a legally fictitious claim asserted by him individually, any arguments that the first heir had received his "full aliquot share of the estate" and therefore had no interest in the side payment and was without legal remedy would receive the scorn they deserve.

When the analogous situation arises in a so-called corporate reorganization the realities seem to be obscured by the number of individuals involved, the real and im-

aginary complexities of the corporate form or forms and perhaps most by the obfuscating terminology which characterizes those proceedings.

If the alleged individual claim of the Class A stockholders in Arknat or of the preferred heir in the analagous situation mentioned above has some legally recognizable basis, then Cities here or the insurance company there could make the side payment and plausibly argue that the common stockholders or the other equal heir, as the case may be, had no interest in it and had received their or his "full aliquot share of the estate." Without however, some such legal basis for the alleged separate individual claim, the side payment becomes a fraud on the other party entitled to share equally and the party defrauded accordingly has an interest in it and is entitled to damages in conpensation.

Taking up the briefs of the three respondents in order, the following statements and citations therein seem to us to require correction and comment:

Brief for Respondent Cities Service Company

Page 2: It is here stated that a holding to the effect that the claim of the Class A stockholders was invalid and that the payment of an extra $1.25 per share to them was a windfall "would not entitle the complaining stockholders to receive any more than they have already received under the plan." We submit that that statement is erroneous, for if the Class A stockholders and Common stockholders are entitled as a matter of law to equal treatment, and if they have not received it and the Class A stockholders have received a preferential payment on an illegal basis, then the Common stockholders are entitled either (a) to a redistribution of that sum equally among the Class A and Common stock-

holders, or (b) if such redistribution is impossible because of Cities' voluntary action in proceeding with the payment despite this appeal, to have Cities compelled to make a similar per share payment to the Common stockholders.

The second question posed by Cities as to whether the Commission had authority to approve the settlement of claims is particularly specious here. We have repeatedly said that we did not question the Commission's authority to approve a settlement of claims generally, but that there must be some valid legal basis for the claims so settled. They must not be fictitious or patently illegal, *because if they are the Commission's authority to settle claims becomes merely a guise and a technique for achieving an illegal preference among stockholders of equal rights.*

Page 5: The recital here as to Cities' alleged offer "to compromise all claims by payment of $1.50 per share to public holders of Class A Stock and 25¢ per share to public holders of Common Stock" and the contentions of the Class A and Common stock committee regarding the same, no doubt understandably omits reference to Cities own strong opposition before the Commission to the alleged class claim of the Class A stockholders.

Page 6: It is stated that "since no stay was obtained" etc., Cities consummated the plan and went ahead with the preferential payment to the Class A stockholders, which is the subject matter of this appeal. We submit that in so doing Cities proceeded at its own risk and that if the payment in question violated the rights of the Common stockholders to equal treatment with

the Class A stockholders, that violation can now only be corrected by payment of the same amount to the Common stockholders since Cities has itself made redistribution of the amount paid to the A stock impossible. The Common stockholders' rights were certainly not foreclosed, affected or impaired because Cities chose to go ahead with the disparate payment to the A stockholders despite the pending appeal. Annexed hereto as Exhibit A is a copy of the stipulation secured by the Common stockholders' committee to prevent any prejudice to the rights of the Common stockholders on this appeal by virtue of the accompanying statements sent by Cities to Arknat stockholders with the checks in payment of the amounts awarded under the plan.

Page 7: The statement is here made that the Common stockholders' "only contention is that the A stock should not have been paid anything in settlement of the class claim." Such is not "their only contention", and such statement evades the whole question here presented. Their contention is that they were and are entitled to equal treatment with the Class A stock in this reorganization and that where an additional payment has been made to the A stock on an illegal basis, then an equal amount must be paid to the Common stock. In other words the question is not so much with regard to Cities' right to pay the A stock as it is the right to pay them without paying an equal amount to the Common for the reason that discrimination accomplished by the payment of a fictitious class claim is still discrimination.

Page 8: The statement that the Common stock is not injured or aggrieved by the preferential pay-

ment to the A stockholders has already been answered above.

The statement that the principle that stockholders with the same contract rights are entitled to ratable distribution of the assets of the enterprise "was in no way violated here" *is true only if the payment paid to the Class A stockholders was on account of a bona fide and legally recognizable separate individual class claim.* If, as we contend, it was not, then the attempted separation of the corporate claims and the individual Class A claims becomes nothing but a specious device for a preferential payment to the A stockholders and a fraud on the Common stockholders.

Page 9: It is asserted that the validity or invalidity of the Class A stockholders' claim was completely irrelevant to the merit or lack of merit of the corporate claims and since the Common stockholders have not appealed the settlement of the corporate claims, they have no standing to question the Commission's findings as to the A stockholders' alleged class claim.

As we have repeatedly said, we think that the Commission's findings as to the corporate claims was unfair and inadequate and unduly influenced by its collateral position with respect to the class claim of the A stockholders. However, the corporate claims did have a valid legal existence and merit and in our opinion the cases hold that the Commission's finding thereon are final and not appealable unless there is some mistake of law. But by the same token its findings as to the alleged class claim of the A stockholders is in our opinion invalid *as a matter of law.* If it had some valid legal basis, then as respondents assert it would be

irrelevant as far as the corporate claims are concerned, but if it has not, then, as we have said repeatedly before, it becomes nothing but a technique and device for achieving an unequal payment to the A stockholders in derogation if not in actual fraud of the Common stockholders' right to equal treatment.

Page 9: Cities now endeavors to persuade this Court, as it has persuaded the Courts below, that its offer of $1.25 per share additional to the Class A stock was a *bona fide* offer in settlement of the alleged class claim by the Class A stockholders. That it was not and that the payment was initially dictated by the Commission is sufficiently established by the opposition of Cities to this feature of the plan in its briefs before the Commission* and the testi-

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* Cities' brief, April 2, 1953 before S. E. C., pp. 28-9, 32-3:

"As of December 1, 1951 only approximately 13.6% of the publicly-held A Stock was still held by persons (including executors and administrators) who acquired them during the entire 1929-1930 period that the A Stock was being marketed, and only 5.89% of the publicly-held A Stock was still held by persons (including executors and administrators) who acquired them during the June-September period when the prices are alleged to have been inflated (C. S. Exh. 30).

"The law is well-settled that rights of action for rescission or damages do not pass with the shares to subsequent purchasers, or donees. The law on this point was carefully considered and established by the courts in one phase of the reorganization of the Associated Gas and Electric system usually referred to as the "CDC Litigation".

* * * * * *

"Although the courts in the *Associated* case were particularly concerned with New York law, the law of other states is the same. See *Huston* v. *Ohio & Colorado Smelting & Refining Co.*, 63 Colo. 152, 165 Pac. 251 and *Schwartz* v. *Durham*, 52 Ariz. 256, 80 Pac. 2d 453.

* * * * * *

"The foregoing demonstrates that the large majority of holders of A Stock who in fact have a profit on their acquisition and no shadow of a claim, cannot, in order to obtain a further and purely windfall profit, hide under the skirts of the small minority who conceivably might have a claim."

mony of its officers referred to at pages 23-4-5 of our brief in support of the petition for certiorari herein.

Page 11: The above references sufficiently disprove the statement made on page 11 of Cities' brief that "After it made the offer, Cities of course did its best to get the offer approved; * * *".

Page 13: It is here stated "But neither principle, precedent nor sound administrative practice required it [Cities] to conduct war to the uttermost". With that we could agree, but there had to be some legally recognizable basis for the claim before it could be given the unique treatment it received. If it had been mingled with other claims which were valid, then it might rest on the basis of an overall settlement, but such is not the situation here. It was the single claim on the basis of which the alleged settlement with the Class A stockholders was made and unless it had some legal validity, the purported "settlement" becomes in fact a gratuity and windfall to the Class A stockholders, and irrespective of their deserts, a violation of the Common Stockholders' right to equal treatment.

The same comment applies with equal force to the statement of the Commission, here quoted by Cities, that "we are not called upon to adjudicate the merits of or to assign a specific monetary value to each particular claim". The abuse to which that rule of convenience is subject is demonstrated in the instant case. Whatever excuse the rule might have where various claims, some valid, some not valid, are involved, it fails when there is a single claim which any honest appraisal would reveal has no legal merit whatever.

Page 14: Cities says that the cases cited by petitioners are not in point because they involved decisions by the Commission "based on erroneous determinations of settled judicial doctrines". *We submit that that is precisely the situation here,* and although the Commission's determinations as to facts may be beyond appeal, its erroneous determinations of law are not. It is those and only those which we ask this Court to review here.

Brief for Respondent Class A Common Stock Committee

Page 2: Question 1 posed by these respondents is erroneous in that it begs the whole question involved here by asserting that the Common stock "has received full parity treatment in the distribution of the assets" of Arknat. It is only superficially true that the sum allocated by the Commission and by Cities to derivative corporate claims against it has been equally and ratably distributed among the Class A and the Common stockholders. But a far larger sum was allocated by them to a so-called individual class claim of the A stockholders, giving them $1.25 per share more than the Common stockholders. *This, we submit, could not legally be done unless there was some legally recognizable basis for the alleged class claim of the A stockholders.* If the Commission was desirous of punishing Cities and the latter had agreed to pay $4,000,000 to obtain a release from all stockholders, the same ratable distribution could have been accomplished by dividing the fund among all stockholders.

Question 2 is similarly erroneous in its assertion that petitioners "cannot benefit" from this appeal. Cities proceeded with the disparate payment of $1.25 per share extra to the A stockholders despite the pending appeal from that feature of the plan. Cities could not thereby foreclose or change the Common stockholders' rights. If Cities by its action has made it impossible for it to recover back that payment, which is presumably impracticable if not impossible, then it can only right the wrong by payment of an equal amount to the Common stockholders. We do not think the law is so without recourse or resource that the injury brazenly done the Common stockholders must now go uncompensated.

Page 3: The argument here again made that the public Common stockholders have received their full share because the amount allocated to the corporate claims of Arknat was equally distributed among them and the Class A stockholders and that petitioners have not appealed from the determination of the Commission regarding the corporate claims is subject to the same answer made above to the similar arguments advanced in Cities' brief. As we understand the cases, the Commission's determinations as to the facts cannot successfully be appealed from but we have the temerity to hope that its erroneous determination with regard to the law on which it bases its special award to Class A stockholders can be.

Page 4: The outline of facts here presented omits the fact that the first million shares of Class A stock or over ¼ of the total outstanding was initially issued and sold to the Common stock-

holders at $4.00 per share, and that no possible claim as to inflated prices or market manipulation can be made with regard to this 25% portion of the Class A stock.

The statement as to the market rigging operation also omits reference to the fact that the Common stock prices were similarly inflated along with those of the Class A stock, and *any Common stockholders who purchased their stock on the public market during that period suffered individually exactly the same injury from Cities that a Class A stockholder suffered.*

It is stated that Cities' market manipulation benefited the Public Common stockholders. As a matter of law that would be totally irrelevant to the issues here (*S. E. C.* v. *Central-Illinois Corp.*, 339 U. S. 96, 152), but the statement itself is contrary to the fact. The benefit, if any, to the Common stockholders was very small. The Common stock itself at all times sold on the market at prices equal to or higher than the Class A stock. In so far as such prices were inflated, the individual Common stock purchaser suffered the same injury as the purchaser of Class A stock, and as the figures in the exhibits before the Commission demonstrated, a large part of the inflated sums initially realized by Cities in this market operation were used up by it in subsequent support of the market by Cities. Much has been made by the Class A stockholders and by the Commission of this purported difference in equity capital contributions by the two classes of stock, but the cases to date rule out any such basis of allocation between stockholders in a corporate reorganization. Presumably the possibilities for conjecture and discrimination are too great to

allow any such basis for determination of the relative rights of stockholders in a corporate enterprise. (*Jackson* v. *White*, 188 Fed. 775, 779 (C. A. 4, 1911); *White* v. *Wogamon*, 47 Ariz. 195, 54 Pac. (2d) 793 (1936); *Standard Gas & Electric Co.* v. *Deep Rock Oil Corp.*, 117 Fed. (2d) 615 (C. A. 10, 1941), cert. den. 313 U. S. 564; *In re North American Light & Power Co.* (1947), H. C. Rel. 7514.

Page 5: Cases here cited by respondents afford no authority whatever for the proposition that "recognition must be accorded the fact that, at the expense of the Class A interest, Cities had fraudulently procured an inflated equity interest in Arknat".

Both *Taylor* v. *Standard Gas and Electric Co.*, 306 U. S. 307, and *Pepper* v. *Litton*, 308 U. S. 295, deal with the subordination of the claims of majority and controlling stockholders in the subject corporation in favor of minority public stockholders and creditors, whose claims in each case are wholly derivative and based on violations of fiduciary duty. Neither deals in any way with the claims or rights of public stockholders against a parent corporation for fraud or misrepresentations in the sale of stock to individuals under varying circumstances, which is a wholly different situation. Such claims are individual, not derivative, and involve no breach of fiduciary duty on the part of the seller. This basic distinction between these cited cases and the instant situation, respondents appear unable or unwilling to grasp.

Page 6: Here again question "1" posed by the respondents begs and avoids the issue by claiming that the Public Common stockholders received "parity treatment in the distribution of the

assets of Arknat". They received their equal share of that part of the claims award which was allocated only as a matter of form to the derivative corporate claims, but they did not receive the equal treatment which they are legally entitled to have with all other stockholders of equal right unless the additional amount paid to the Class A stockholders was paid on a *bona fide* claim by them. By so much *"whether or not that claim had merit" becomes the basic issue here, because whether it did have such merit determines whether the Common stockholders have or have not received the equal treatment to which they are entitled as a matter of law.*

Question "2" presented by respondents here does not make it clear what "settlement payment" is referred to, but presumably reference is made to the 25¢ per share payment on account of the so-called corporate derivative claims since it is stated that "no party affected thereby has appealed". Our reasons for not attacking that here are sufficiently set forth above in answer to the Cities' brief. That payment may be "moot" as respondents assert, but not the payment of $1.25 per share additional of the A stock, although Cities presumably hoped to make it so by proceeding with the payment despite this appeal.

Page 7: The specious argument here repeated that the "Common stock of Arknat has received its full aliquot interest in the assets of the corporation", and that it accordingly has no interest in the side payment to the A stockholders has already been answered above.

Respondents completely miss the point of this appeal if they think as here stated that "peti-

tioner does not contend that the Common stockholders are entitled to more''. On the contrary, we do contend that the Common stockholders are entitled to more—on the simple legal principle that stockholders of equal right are entitled to equal treatment and cannot be denied that on legally fictitious grounds; in other words they are entitled to precisely the same amount as the Class A stockholders, unless some valid legal basis can be found for the additional payment to the latter. And that, we submit, does not exist.

It is further stated that if the claim asserted by the Class A stockholders is without merit, that still leaves the Common stockholders without any basis for complaint. That is of course what the Commission, Cities and the Class A stockholders' committee hoped to achieve by this very clever, arbitrary and artificial division of 25¢ to all stockholders on account of the corporate claims and $1.25 per share extra to the Class A stock on account of their alleged class claim against Cities for the alleged market manipulation. If the Class A claim had no merit, then there was no legal basis for the unequal treatment of the two classes of stock and Cities having proceeded despite the pending appeal with this unequal payment to the Class A stockholders can now only redress the wrong by a similar payment to the Common stockholders.

The Common stockholders are aggrieved because they have not received the equal treatment to which they are by law and contract entitled.

Hooker v. *Burr*, 194 U. S. 415, 419, here cited and quoted by respondents is wholly inapposite.

That case dealt with a question of the constitutionality of a state statute changing the right of redemption after foreclosure of real property. Appellant was the purchaser at the foreclosure sale, not claiming under either the mortgagor or mortgagee, and his interest was accordingly held too remote.

Page 8: We think that only the incredibly naive will believe that Cities would not have been willing to pay on the corporate claims any amount that it did not have to pay on account of the alleged class claim of the Class A stockholders. We submit that this goes considerably beyond mere conjecture and is amply supported by the statement of the officers of Cities itself in cross examination (see pages 23-4-5 of our main brief herein), but whether such would or might have been the case is beside the point on this appeal. Our appeal here rests on no such conjecture. The Common stockholders do not seek more on conjectural grounds that more would have been paid on the corporate claim if less had been paid on the alleged Class A separate class claim of the stockholders, but the Common stockholders do seek more on the simple legal principle that they are entitled to and should receive the same amount paid to the Class A stockholders, unless some legally adequate reason can be advanced, as none has been to date, for the separate payment to them.

Page 9: The quotation from *Doremus* v. *Board of Education*, 342 U. S. 429, 432, that "* * * this Court does not sit to decide arguments after events have put them to rest" is apposite only as indicating respondents' wishful thinking. They no doubt hoped to achieve such result by proceeding with the payments under the plan

despite this appeal, but fortunately for petitioners such is not yet the fact.

The reference to Mr. Justice Holmes' phrase "disinterested malevolence" in his opinion in *American Bank & Trust Company, et al.* v. *Federal Reserve Bank of Atlanta, Georgia, et al.*, 256 U. S. 350, 358 (1921), is interesting because there as here it was shown on the part of the appellees, not the appellants, and contrary to respondents' assertion here, Justice Holmes there held it did have a place in appellate procedure and could be recognized and redressed as such. The Reserve Bank under its right to collect and clear checks for payment claimed the right to hold them and present them to the drawee banks in such embarrassingly large quantities as to drive them out of business or into the Reserve system. He rejected that sophistry and held the injury thus intended and effected was none the less actionable because accomplished under otherwise legal right. By the same token, respondents here claim that because the Common stockholders have received their proper share of the amount allocated to corporate derivative claims, the diversion of a far larger amount to the Class A stock through an alleged separate class claim settlement is thereby put beyond the scrutiny of this Court. *Similar perception here will show that the injury to the Common stockholders is none the less real because of the outer, and admittedly clever, legal form by which it has been accomplished.*

The statement at the bottom of this page that "it has been finally adjudicated that the common stock has received everything to which it is entitled" is simply not true. There has been

no such final adjudication yet. If, as we submit, the Common stockholders are entitled as a matter of law to equal treatment with other stockholders of equal right, this Court has full right and power to so decree.

Page 10: It is true that if the alleged separate settlement payment by Cities to the Class A stock "could have been negated" the A stock would have received less, and both it and the Common would have merely shared equally and pro rata in the derivative claims settlement. But such is not the situation now presented. The additional separate payment to the Class A stockholders has been made *and unless it was made on some valid legal basis, the Common by virtue of its right to equal treatment is entitled to the same amount.*

It is stated that "Petitioner misconceives the judicial function". The misconception is apparently on the part of these respondents, other than the Commission itself which in its brief (p. 9) concedes the Court's right of review here. The three cases here cited and quoted by respondents are not remotely applicable. In *C. & S. Airlines* v. *Waterman Corp.*, 333 U. S. 103 (1947), this Court refused to review an order of the Civil Aeronautics Board approved by the president as outside its jurisdiction; *Amalgamated Asso.* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, involved a question of review of a judgment of the Wisconsin Court upholding an arbitrator's award which had been superseded by agreement and time of performance of which had elapsed; and *Colman* v. *Miller*, 307 U. S. 433, concerned this Court's right of review of state action in ratifying an amendment to the Federal Constitution.

The applicable law as to this Court's right and duty to review here is succinctly stated by Mr. Justice Frankfurter in *S. E. C.* v. *Chenery Corp, et al.*, 318 U. S. 80, 87, 89-90 and likewise in *S. E. C.* v. *Cogan*, 201 Fed. (2d) 78, 85, cited and quoted at pages 17 and 18 of our main brief herein.

Brief for The Securities and Exchange Commission

Page 5: The statement of facts here mentions that through Cities' market manipulations "the quoted prices of the class A common stocks were greatly inflated", but it should also be stated that the quoted prices of the common stock were likewise inflated (see our main brief, pp. 5, 6).

Page 7: The argument that the "plan gives full recognition to the contractual rights of the common and Class A stocks in that parity treatment is accorded to both classes of stock in the assets and earnings of Arkansas-Natural" has already been fully dealt with above in answer to similar arguments in the Cities' and Class A Committee's briefs.

Page 8: It is here stated that "the mere fact that defenses might have been asserted by Cities against the claims of the Class A stockholders does not preclude approval of the settlement". With that statement we have no quarrel. But that, we submit, is not the question here. The basic question is whether the Class A stockholders, over 85% of whom are transferees of the original purchasers of said stock during the period of Cities' alleged market manipulation in 1929 and 1930 (at prices from 8¾ to 24⅝)

can, as a matter of law, as such subsequent transferees have inherited any present claim against Cities in that regard.

Subsidiary to this are two other questions, (a) whether Cities in its sales of such Class A stock to the purchasers can be said to have breached any "fiduciary duty" to them, and (b) whether the Class A stockholders, independently of the plan of reorganization, could be said to have a "class" claim.

As to the former, we submit that Cities as vendor of the Class A stock could not be said to have stood in any fiduciary relationship with the purchasers thereof at the time of purchase (see our main brief herein, Point III, pp. 19-22).

As to the "class claim", two cases here cited by the Commission, namely, *Zahn* v. *Transamerica Corp.*, 162 F. (2d) 36, and *Oppenheimer* v. *F. J. Young & Co.*, 144 F. (2d) 387, confirm the position taken in our main brief (pp. 25-6-7) that at best only the original Class A stockholders who purchased their stock in 1929 and still retain it might be allowed to maintain a "spurious" class action under the federal rules of procedure. The difference between a true "class" action and a "spurious" class action as a procedural joinder device seems still to be ignored by the respondents. As Judge Augustus Hand states in his opinion in the *Oppenheimer* case (p. 390):

> "There can be no doubt that claimants who become parties to this class suit would, if successful, be entitled to a different measure of damages."

Page 9: Comparison is here invited with *Phelan* v. *Middle States Oil Corp.*, 154 Fed. (2d) 978, 999-

1002, as authority for the statement "Nor is it by any means settled law that successors to the original purchasers of the Class A stock were precluded from bringing suit as transferees of such stock". The *Phelan* case involved a question of the liability of a federal equity receiver to holders of bearer bonds. It seems obvious that their rights are in the nature of things derivative through the bankrupt estate as creditors and that any surcharge of the receiver would inure to the benefit of the estate and through it to their benefit as creditors. This case is cited in *Plitt* v. *Stonebraker*, 195 Fed. (2d) 39, 42, as authority for the proposition "One rule is that all security for payment of a promissory note follows the note and inures to the benefit of the holder of the note". The discussion in the *Phelan* case as to security transferee rights appears to be *dicta*, since Judge Frank introduces the discussion by referring to it as "Another argument based upon New York decisions (not suggested here or in the Court below by appellees)".

We submit that the statement of the law in that regard, as set forth in our main brief (pp. 27-8-9), that a bare transfer of stock does not in the absence of special assignment carry with it any right of action for damages caused by false representations made to the original purchaser has not been, and we think cannot be, successfully controverted either as a matter of New York law or general law.

We have already dealt in our main brief (pp. 21-2) with the misapplication and perversion of the fiduciary duty principle laid down in *Pepper* v. *Litton*, 308 U. S. 295, 304 and

American United Mutual Life Insurance Co. v. *City of Avon Park,* 311 U. S. 138, 146, which the Commission here again cites and relies on as validating its finding of liability by Cities to the Class A stockholders.

In re Electric Power & Light Corp., 176 Fed. (2d) 687, is cited as authority for the statement that "the settlement of such claims, rather than litigation on the merits, is an appropriate equitable remedy". With that abstract statement we have no quarrel but the proposition and the case cited do not meet the issue here. In that case the claims settled were derivative in nature and had some at least arguable legal basis. The claims of the Class A stockholders here have neither of these characteristics.

Page 10: The conclusion of the Commission that "The petition for writ of certiorari asserts no conflict of decision" is erroneous. As shown here and in our main brief, there is "conflict of decision" in the following three areas here:

(a) The fiduciary duty principle as enunciated by this Court in *Pepper* v. *Litton,* 308 U. S. 295, and *American United Mutual Life Ins. Co.* v. *City of Avon Park,* 311 U. S. 138, is misapplied and distorted in the Findings and Opinion of the S. E. C. here as it was in *S. E. C.* v. *Chenery Corp.,* 318 U. S. 80.

(b) The additional payment to the Class A stockholders rests on the premise that the over 85% of the present holders who are transferees of the original purchasers inherited the latters' rights of action for fraud and misrepresentation against Cities—contrary to established law

(our main brief, pp. 27-30), and contrary to the decision of the Commission itself *In the Matter of Stanley Clarke, Trustee of Associated Gas & Electric Co.*, H. C. Rel. 4985, p. 45 (1944); *In re Associated Gas & Elec. Co.*, 53 F. Supp. 107, 112, aff'd *sub. nom. Elias* v. *Clarke*, 143 F. 2d) 641;

(c) The inclusion and settlement in the instant plan of reorganization of personal, non-derivative claims of stockholders is contrary to the previously established practice of the Commission, if not in fact outside its jurisdiction. *Matter of Columbia Gas & Electric Corp., et al.*, H. C. Rel. 3885, p. 25 (1942).

CONCLUSION

For the reasons stated above and in our main brief herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Docket No. 11041

STIPULATION

In the Matter of

ARKANSAS NATURAL GAS CORPORATION
CITIES SERVICE COMPANY
ARKANSAS LOUISIANA GAS COMPANY
ARKANSAS FUEL OIL COMPANY

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Appellants.

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned that the application of the Public Common Stockholders' Protective Committee for a stay of the consummation, etc., of the amended plan of Arkansas Natural Gas Corporation is hereby withdrawn upon the express understanding and agreement by Cities Service Company and Arkansas Natural Gas Corporation that the letter of transmittal dated April 8, 1953 and the statement appearing on checks sent therewith to the stockholders shall be considered merely notice of the provisions of the amended plan and shall otherwise be without prejudice to the rights of said common stockholders or the Class A

stockholders in the pending appeal or any subsequent proceedings herein.

Dated: April 15, 1953.

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